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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1383

RICHARD A. GANT, *et al.*,

Petitioners,

v.

UNION BANK, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

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No. .....

RICHARD A. GANT, *et al.*,

Petitioners,

v.

UNION BANK, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 10, 1979.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 609 F.2d 411 (1979), appears in the Appendix hereto at page A-2. The opinion of the United States District Court for the Southern District of California, reported at 75 F.R.D. 702 (1977), appears in the Appendix hereto at page A-48.

[1]A complete list of Petitioners is set forth in the Appendix hereto at page A-1.

Jurisdiction

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 10, 1979, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

When the complexity of the issues and evidence in a civil case is beyond the practical abilities and limitations of a jury, does the Seventh Amendment permit and the Due Process Clause of the Fifth Amendment require the striking of a jury demand?

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall be . . . deprived of . . . property, without due process of law. . . ."

The Seventh Amendment to the United States Constitution provides, in relevant part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Statement of the Case

The order of the United States Court of Appeals for the Ninth Circuit which Petitioners seek to have reviewed by this Court arose in the multidistrict proceeding designated as *In re U.S. Financial Securities Litigation,* M.D.L. Docket No. 161. Jurisdiction of the federal district court was invoked in this action because the purported causes of action arise under the federal securities laws.

During the early 1970s U.S. Financial ("USF") was a nationally known company engaged in virtually all aspects of the real estate business, including the development, sale and financing of real estate and shelter, title insurance and architectural design. Prior to 1972 USF had issued and sold certain securities. Thereafter, in late 1972, trading in USF's securities was suspended. In July 1973 USF filed a petition for reorganization and subsequently began liquidation under Chapter X of the Bankruptcy Act.

Thereafter, some one hundred defendants including USF and its officers, directors, accountants, lawyers and underwriters were sued for alleged violation of numerous federal securities laws as well as state securities laws and for common law fraud by the purchasers of USF's securities. A-50. In total, five class actions on behalf of purchasers of three different types of USF securities (common stock, "Eurodollar" debentures and "domestic" debentures) and thirteen non-class actions were brought by holders of USF common stock, holders of different classes of USF debentures, and holders of various series of USF preferred stock. A-49-50. Those actions were commenced in several United States district courts throughout the country and were eventually assigned, pursuant to 28 U.S.C. §1407, to the Southern District of California for coordinated or consolidated pretrial proceedings. *In re U.S. Financial Securities Litigation,* 375 F.Supp. 1403, 1404 (Jud. Pan. Mul. Lit. 1974).

During pretrial proceedings the following facts became evident. First, counsel for the parties anticipated trial would last at least two years. A-68. Second, upwards of five million documents were produced in discovery, some 150,000 pages of deposition testimony

were taken, and plaintiffs indicated that they alone would call 241 witnesses at trial, introduce 11,729 trial exhibits totalling approximately 250,000 pages and read thousands of pages of deposition transcripts at trial. A-53 and 55. Third, plaintiffs listed sixty-one pages of alleged misleading statements and omissions from financial statements, reports, or other documents disseminated by USF from 1966 to 1972, which would require the trier of fact to scrutinize USF's accounting techniques and financial records in at least seventy-five complex real estate transactions which took place over a period of several years. A-66. In any given transaction, USF or one or more of its subsidiaries may have been involved in the acquisition, development, or transfer of the property. Still another USF subsidiary may have entered into a management agreement with respect to the property. *Id.* Various joint venture agreements, sales agreements, leases, commitment fee agreements, architectural and design loans, participation agreements, permanent or interim lending commitments and mortgages might have been involved in any single transaction. In addition, there are a myriad of other issues raised with respect to USF's conduct of its day-to-day business affairs, such as the proper accounting principles and theories to be applied to joint venture transactions and transactions with joint venturers, affiliates and related parties in general; the propriety of "front ending" fees from joint ventures and their operations; and the timing and recognition of income from USF's various operations.

On May 12, 1977, the United States District Court for the Southern District of California, the Honorable Howard B. Turrentine presiding, *sua sponte* issued an order to show cause why the court should not strike

all jury demands because a jury could not understand the complexities of the case and reach a reasoned verdict. On June 24, 1977, after extensive briefing and oral argument, the court entered an order (i) striking all jury trial demands and (ii) certifying the order for interlocutory appeal pursuant to 28 U.S.C. §1292(b). A-73. The court thoroughly considered the complicated factual and legal issues presented, the overwhelming evidence and documentation, anticipated length of trial and numerous parties involved in concluding that a jury could not fairly resolve such complex matters.[2] A-48-56, 66-70. In deciding to strike the jury demand, the court relied on substantial Seventh Amendment authority including *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), in which this Court indicated that one of the three factors to be considered in deciding the right to a jury trial was "the practical abilities and limitations of juries."

On August 29, 1977, the United States Court of Appeals for the Ninth Circuit granted permission to appeal. On December 10, 1979, the Ninth Circuit reversed and remanded the district court's order striking the jury. The court of appeals held that (i) the Seventh Amendment requires a jury trial even in complex civil cases, (ii) the three-pronged *Ross* test cannot be used as a means of determining the right to a jury trial and (iii) *no case* is *ever* so overwhelmingly complex that it is beyond the abilities of a jury. A-46. The

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[2]Although many of the consolidated cases were settled after the district court rendered its opinion below, the Ninth Circuit accepted the district court's characterization of the complicated nature of the action. A-39. An additional case has been settled since the Ninth Circuit's decision. However, as we have argued below, the complexity of the action is primarily caused by the complicated nature of the factual and legal issues, which have not been simplified by any settlements.

Honorable John F. Kilkenny dissented, affirming the reasoning of the district court's opinion below and stating that "the highly complicated issues presented by this litigation are such that an attempt to dispose of them in a jury trial would result in nothing short of judicial chaos." *Id.*

Reasons for Granting the Writ

1. The Determination of Whether There Exists a Right to a Jury Trial in a Civil Action Too Complex to Be Understood by a Jury Is a Fundamental Question of Constitutional Law That Has Not Been But Should Be Resolved by This Court.

This petition raises the fundamental question whether there exists a right to a jury trial in a complex civil case where a jury cannot reasonably be expected to comprehend the evidence and reach a rational verdict. As the court of appeals below stated, "[t]his appeal presents a challenge which strikes at the heart of this country's system of jurisprudence." A-3. The question presented requires the interpretation and resolution of two of the cornerstones of our judicial system—the Seventh Amendment right to a jury trial in suits at common law and the Fifth Amendment right of due process in the form of a competent finder of fact capable of reaching a rational verdict. It has long been recognized that these rights hold a special importance in our society. As this Court stated in *Jacob v. City of New York*, 315 U.S. 752, 752-753 (1942):

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment.

Similarly, this Court has viewed due process and the right to a fair trial as "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532, 540 (1965). As the court in *United States v. Hunt*, 265 F.Supp. 178 (W.D.Tex. 1967), *aff'd*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969), stated:

> Our modern life gives rise to intricate and complex factual situations in both criminal and civil cases not even dreamed of decades ago. *For a person to be deprived of his or her life, liberty or property by jurors who do not adequately understand and comprehend the evidence would obviously be to deprive such person of his or her constitutional right to due process,* the very process our jury system is intended to insure.

Id. at 187. (Emphasis added.) *See also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* ___ U.S. ___, ___, 99 S.Ct. 2100, 2106 (1979), in which this Court equated due process with procedures for promoting decision-making accuracy, by stating that "[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of fact-finding, is to minimize the risk of erroneous decisions."

In determining whether a right to a jury trial exists in a complex civil action, the entirety of this Court's Seventh Amendment law with particular emphasis on *Ross v. Bernhard* must be interpreted. Second, a litigant's right to fundamental fairness and a rational verdict under the Due Process Clause must be considered in such complex matters. Petitioners believe that under both the Seventh and Fifth Amendments a jury trial is improper where the issues and evidence are beyond the practical abilities and limitations of the jury. However, to the extent a conflict between the two constitutional principles is perceived, it is the function of this Court to harmonize the jury trial right

with the litigant's due process right to a rational verdict.[3]

As members of this Court have recognized, resolution of competing fundamental rights is a particularly appropriate function of this Court in order that sufficient guidance be provided to the trial courts. *Gannett Co., Inc. v. DePasquale,* ___ U.S. ___, ___, 99 S.Ct. 2898, 2915 (1979) (Powell, J., concurring); *see also Nebraska Press Assoc. v. Stuart,* 427 U.S. 539, 571-572 (1976) (White and Powell, JJ., concurring).

Beyond the need to ensure that both important constitutional rights are given full (and not arbitrary) effect, the resolution of the use of a jury trial in a complex civil action will have a substantial, positive impact on the functioning of our judicial system. If the Ninth Circuit's holding is correct, complex cases will not be further delayed by the increasing number of motions to strike jury demands followed by time-consuming interlocutory appeals. On the other hand, if, as Petitioners believe, those extraordinarily complex cases beyond the comprehension of a jury should be tried by the court, significant benefits will result. First, as commercial civil litigation continues to become more complex, our judicial system will be able to render fair and rational decisions. Beyond rendering

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[3]As previously noted, the court of appeals below concluded that *no case* is so overwhelmingly complex that it is beyond the abilities of a jury. A-46. Because of this highly questionable conclusion, which flies in the face of common sense and which was reached without any cited precedent, the court totally disregarded the litigants' due process rights.

a just result, such a procedure would not force jurors to decide issues beyond their comprehension which can only undermine "the legitimacy of our courts," for that legitimacy must ultimately depend on society's belief that judicial decisions are reasoned and accurate. *See* Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process,* 63 Va. L. Rev. 383, 389-390 (1977). Court trials in such actions will not only be fairer but should be speedier as well, which will partially relieve the heavy burden on the judiciary. Further, protracted cases would not have the enormous impact on the lives of the individual jurors, and serious questions could be avoided as to whether a jury will represent a cross-section of the community. *See* Remarks of Chief Justice Burger, Conference of Chief Justices, in Flagstaff, Arizona (August 7, 1979).

2. This Court Should Decide Whether There Exists a Right to a Jury Trial in a Complex Civil Action Because District Courts Are Split on the Issue and the Decision Below Conflicts With the Decisions of Six Other Courts of Appeals as to Whether Ross v. Bernhard Provides the Proper Standard for Resolving the Issue.

The lower courts are split on whether a judge may strike a jury demand in a civil action solely on the ground that the case is so complex that it is beyond the ability of the jury to reach a rational verdict. To date, four courts have used that rationale to strike jury demands. *In re Boise Cascade Securities Litigation,* 420 F.Supp. 99 (W.D.Wash. 1976) (jury demand struck in complex securities fraud case); *Bernstein v. Universal Pictures, Inc.,* 79 F.R.D. 59 (S.D.N.Y. 1978) (jury demand struck in complex antitrust case), *permission for interlocutory appeal denied,* No. 78-8211

(2d Cir. July 20, 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.,* 458 F.Supp. 423 (N.D.Cal. 1978) (jury demand struck in complex antitrust case in the event of a remand for retrial), *appeal pending sub nom. Memorex Corp. v. IBM Corp.,* Nos. 78-3050, 78-3236 (9th Cir., docketed September 12 and October 6, 1978); *see also Rosen v. Dick,* 83 F.R.D. 540 (S.D.N.Y. 1979) (in complex securities fraud case, advisory verdict from jury would not be sought on issues as to which demand for jury trial would have been stricken), *interlocutory appeal docketed,* No. 79-7712 (2d Cir. November 27, 1979).

On the other hand, in addition to the court of appeals below, three courts have explicitly rejected the striking of a jury demand even though the case was complex. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 478 F.Supp. 889 (E.D.Pa. 1979) (denied motion to strike jury in complex antitrust action), *interlocutory appeal docketed,* No. 79-2540 (3d Cir. September 20, 1979) (argued February 14, 1980); *Greyhound Computer Corp. v. IBM Corp.,* No. Civ. 72-242-PHX-WPC (D.Ariz. November 6, 1979) (denied motion to strike jury demand in a complex case for "lack of authority"), *permission for interlocutory appeal denied,* (9th Cir. February 1, 1980); *In re IBM Peripheral Devices Antitrust Litigation,* 459 F. Supp. 626 (N.D.Cal. 1978) (the command of the Seventh Amendment is clear even though the case is complex); *see also Tights v. Stanley,* 441 F.2d 336 (4th Cir.), *cert. denied,* 404 U.S. 852 (1971), and *Radial Lip Mach., Inc. v. International Carbide Corp.,* 76 F.R.D. 224 (N.D.Ill. 1977) (neither case held to be complex, but the courts' reasoning was contrary to that in other cases striking juries).

While the district courts are deeply divided on the right to a jury trial in a complex case, the opinion below represents the first court of appeals to decide whether a jury demand may be struck *solely* on the ground of complexity.[4] However, this controversy will not be resolved without guidance from this Court, since the focal point in the district courts' inquiries into the right to a jury trial in a complex civil action has been this Court's footnote in *Ross v. Bernhard*, 396 U.S. at 538 n.10 (1970). *See* A-14. In *Ross* this Court enunciated a three-pronged test to determine whether an issue was legal and thus tried to a jury, or equitable and tried to the court:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, *the practical abilities and limitations of juries*. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply. See James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963).

396 U.S. at 538 n.10. (Emphasis added.)

The court of appeals below rejected the *Ross* test and the inquiry into the practical abilities and limitations of juries as a means of determining the right to a jury trial under the Seventh Amendment. A-28-33, 46. In so doing, the court created a conflict with six other courts of appeals and numerous district courts which have used the three-pronged *Ross* test to determine the right to a jury trial. *Cox v.*

[4]As such, this case presents the same degree of lower court disagreement as existed in *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974).

C. H. Masland & Sons, Inc., 607 F.2d 138, 143 (5th Cir. 1979); *United States v. Anderson*, 584 F.2d 369, 373 (10th Cir. 1978); *Pons v. Lorillard*, 549 F.2d 950, 953-954 (4th Cir. 1977), *aff'd on other grounds*, 434 U.S. 575 (1978); *Minnis v. International Union, United Auto., Aerospace, etc.*, 531 F.2d 850, 852-853 (8th Cir. 1975); *Hyde Properties v. McCoy*, 507 F.2d 301, 305-306 (6th Cir. 1974); *Rogers v. Loether*, 467 F.2d 1110, 1117-1118 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974).[5] Of particular significance is *Hyde Properties v. McCoy, supra*, where the Sixth Circuit struck a jury demand in an interpleader action involving complicated real estate and accounting issues. In *Hyde Properties* the court used the *Ross* test and concluded with respect to the third prong that "a jury is not especially well-qualified to dispose of such issues and that a non-jury trial is both more efficient and *more likely to produce a just result*." 507 F.2d at 306. (Emphasis added.)

The commentators, it might be noted, are in even more disagreement about the use of the *Ross* test in

[5]With the exception of a passing reference to *Rogers v. Loether*, the court of appeals below did not even consider these cases in reaching its decision to reject this Court's three-pronged test from *Ross*. The court below properly noted that in *Rogers v. Loether* the Seventh Circuit (by then Circuit Judge Stevens) expressly used the *Ross* test and considered the "practical abilities and limitations of juries" (467 F.2d at 1118) but that this Court did not specifically mention that factor in *Curtis v. Loether*, 415 U.S. 189 (1974). The fact that this Court used the first two prongs of the *Ross* test in *Curtis v. Loether* but failed to refer to the "test" itself or the third prong has added to the confusion associated with the *Ross* case. *See Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 225 n.25 (4th Cir. 1978), *cert. denied*, 439 U.S. 934 (1979); Note, *The Right To Jury Trial In Complex Civil Litigation*, 92 Harv. L. Rev. 898, 903-904 (1979).

determining the right to a jury trial in a civil action. *Compare* Note, *The Right to Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898, 903-906 (1979); Note, *Congressional Provision for Non-jury Trial Under the Seventh Amendment*, 83 Yale L.J. 401, 410-412 (1973); *with* Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 Stan. L. Rev. 99, 106-107 (1979); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U.L. Rev. 486, 526 (1975); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 645 (1973). Still other commentators candidly admit that the significance and applicability of the *Ross* footnote is uncertain. *See, e.g.*, Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 Conn. L. Rev. 775, 797 (1978); Note, *Unfit For Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 Bos. Col. L. Rev. 511, 518 (1979).

In sum, not only are the district courts in disagreement as to whether a timely jury demand may be stricken in a complex case, but the courts of appeals are now in conflict as to whether *Ross* provides the proper standard for resolving the issue. These conflicts in the lower courts lead to the inescapable conclusion that this Court should resolve the right to a jury trial in a complex civil action. *See* Harris and Liberman, *Can The Jury Survive The Complex Antitrust Case?*, 24 N.Y.L. Sch. L. Rev. 611, 630, 637 (1979).

Conclusion

The widespread split in the lower courts on the right to a jury trial in a complex case and the applicability of the *Ross* test, coupled with the need for guidance in balancing the fundamental rights of trial by jury and due process, provide a compelling basis for the ultimate resolution of these issues by this Court. For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

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Opinion

In the United States Court of Appeals for the Ninth Circuit.

In re U. S. FINANCIAL SECURITIES LITIGATION.

Michael Fabrikant and Milton Binswanger, Petitioners-Appellants, vs. Bache & Co., Basle Securities Corp., et al., Respondents/Appellees. No. 77-2993.

First National Bank of Toledo, etc., et al., Petitioners/Appellants, vs. R. H. Walter, J. B. Halverson, R. G. Steward, et al., Respondents/Appellees. No. 77-2994.

Mellon Bank, N.A., ("Mellon"), et al., Petitioners/Appellants, vs. U.S. Financial, Salmon Bros., et al., Respondents/Appellees. No. 77-2995.

Charles D. Prutzman, Jr., Petitioner, No. 77-3063.

Union Bank, Petitioner, No. 77-3064.

Touche Ross and Company, Petitioner, No. 77-3093.

Angelo Adams, Petitioner, No. 77-3099.

Brown, Wood, Ivey, Mitchell & Petty, Petitioner, No. 77-3121.

Societe Generale De Banque, Rentinvest, et al., Petitioners, No. 77-3122.

Colonial Growth Shares, Inc., Petitioner/Appellant, vs. Touche Ross & Co., et al., Respondents/Appellees. No. 77-3333.

Michael Fabrikant and Milton Binswanger, Plaintiffs/Appellees, vs. Philip Hampton, Philip D. Reed, et al., Defendants/Appellants. No. 77-3344.

Michael Fabrikant and Milton Biswanger, Plaintiffs/Appellees, vs. John Weinberg, etc., et al., Defendants/Appellants. No. 77-3345.

Filed: Dec. 10, 1979.

Appeal from the United States District Court for the Southern District of California.

Before: Kilkenny and Anderson, Circuit Judges, and Byrne,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

This appeal presents a challenge which strikes at the heart of this country's system of jurisprudence. Simply stated, we are asked to decide whether there is a "complexity" exception to the Seventh Amendment right to a jury trial in civil cases. We answer this question in the negative and reverse the decision of the district court.

I. *PROCEEDINGS BELOW*

U. S. Financial (USF) was a high-flying real estate development company which began losing altitude in 1972 and finally crashed in 1973. This spawned an abundance of lawsuits.[1] The present case concerns twenty separate suits filed by a variety of plaintiffs who were on the most part purchasers or representatives

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*The Honorable William M. Byrne, United States District Judge for the Central District of California, sitting by designation.

[1]There have been criminal proceedings, SEC proceedings, bankruptcy proceedings, and private civil damage actions. The present case involves the latter category. Some of the published decisions include: *Matter of U. S. Financial, Inc.*, 594 F.2d 1275 (9th Cir. 1979) (appeal from bankruptcy); *In re United States Financial Securities Litigation*, 75 F.R.D. 702 (S.D.Cal.1977) (order striking jury demand); *In re U. S. Financial Securities Litigation*, 74 F.R.D. 497 (S.D.Cal.1975) (order striking oppressive interrogatories); *In re U. S. Financial Securities Litigation*, 69 F.R.D. 24 (S.D.Cal.1975) (order certifying class); *In re U. S. Financial Securities Litigation*, 385 F.Supp. 586 (Jud.Pan.Mult.Lit.1974) (transfer order); *In re U. S. Financial Securities Litigation*, 375 F.Supp. 1403 (Jud.Pan.Mult. Lit.1974) (transfer order); *In re Financial Securities Litigation*, 64 F.R.D. 443 (S.D.Cal.1974) (order certifying classes); and *In re U. S. Financial Litigation*, 64 F.R.D. 76 (S.D.Cal. 1974) (SEC proceeding).

of purchasers of the different stock and debenture offerings made by USF.[2] The various defendants include USF, certain closely-related companies, assorted USF insiders, underwriters, outside attorneys and accountants. All of the lawsuits present common issues relating to the allegations of federal and state securities law violations, common law fraud and negligence.

The different lawsuits were filed in federal court for the Southern District of California and four other federal judicial districts. The Judicial Panel on Multidistrict Litigation found that the prevalence of common issues and allegations justified transfer of the several cases to the Southern District of California for coordinated or consolidated pretrial proceedings. *In re U. S. Financial Securities Litigation,* 385 F.Supp. 586 (Jud. Pan.Mult.Lit.1974); *In re U. S. Financial Securities Litigation,* 35 F.Supp. 1403 (Jud.Pan.Mult.Lit. 1974).

On its own motion, the court below struck all demands for jury trial in these consolidated cases. Judge Turrentine reasoned that the legal and factual issues were of such complexity as to be beyond the practical abilities and limitations of a jury. *In re U. S. Financial Securities Litigation,* 75 F.R.D. 702 (S.D.Cal.1977). Recognizing the importance of the jury trial question, it was certified for interlocutory appeal under 28 U.S.C. § 1292(b). By an order filed on August 29, 1977, this court granted permission to appeal.

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[2]As explained elsewhere in this opinion (*see* n.10 *infra*), several of the cases have apparently been settled and dismissed by the district court. However, none of the parties who have settled have sought dismissal from this court pursuant to Fed. R.App.P. 42(b). Although the present appeal is moot as to these parties, their names and their Ninth Circuit docket numbers remain in this decision's caption due to the noncompliance with Fed.R.App.P. 42(b).

II. *BACKGROUND*

In order to place this case and the question presented by it in perspective, its background is developed more fully than is normally necessary. Recently, there has been considerable controversy surrounding the Seventh Amendment's guarantee of civil jury trial and the abilities of jurors as fact-finders in complex lawsuits.[3] We therefore briefly sketch the history of USF, the status of the present litigation, the analysis used by the court below, and that used by the other federal district courts which have lately addressed the same issue.

1. *History of USF*

USF grew slowly for the first three years after it was incorporated in 1962 as West Coast Financial.[4] Initially, it was primarily engaged in small accounts receivable financing. In 1964 the USF name was adopted and the company expanded into real estate financing and title insurance. USF also made its first public stock offering and filed a registration statement with the SEC in 1964.

USF's growth and expansion began in earnest when R. H. Walter was appointed president in 1966. Walter brought his two real estate development companies and the joint venture concept with him to USF.[5]

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[3]*See e.g., Time* magazine, Sept. 3, 1979, p. 61.

[4]This skeletal outline of USF's history is taken from the "Plaintiffs' Pre-Trial Memorandum." Clerk's Record (C.R.) 6234-7065.

[5]According to the "Plaintiffs' Pre-Trial Memorandum," the "joint venture concept" caused many of USF's subsequent problems. The plaintiffs' explain the operation of the typical USF joint venture as follows:

> USF sold real estate to a general contractor at a price set by USF and financed the purchase either by loaning

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That same year, USF formed U.S. Mortgage as a subsidiary to make long-term loans on real estate projects.

In 1967, USF acquired Capital Leasing Company. It also found another subsidiary, U. S. Realty, as a real estate sales and management company. And in 1968, USF sold 250,000 shares of common stock in an interstate offering at $10.75 per share.

During 1969 it continued to expand its operations in the real estate field. Twenty million dollars was raised from a public offering of 15,000 units, each consisting of ten shares of common stock and one 5½% convertible subordinated debenture with a face value of $1,000, due in 1989. USF organized and acquired additional title insurance companies, and ex-

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the general contractor the money or by guaranteeing a loan to him. The price at which USF sold the property to a typical USF joint venture partner was determined by USF by adding USF's anticipated future profits from the joint venture to USF's cost basis in the real estate. USF recognized as earnings the difference between its cost basis in the real estate and the price at which it sold the real estate to its joint venture partner. After the sale, the joint venture partner contributed the property to the joint venture as his capital contribution to the venture, which assumed all of the debt on the property. USF charged the joint venture a variety of fees for services allegedly performed. All fees charged by USF to joint ventures in which it participated were reported as earnings by USF prior to 1971. Since the only source of funds for the joint venture was USF, its fees were customarily paid by notes payable to USF or one of its subsidiaries or by cash which USF had contributed to the joint venture. The joint venture partner earned such overhead allowances as a general contractor as were set forth in the joint venture agreement. In form, joint venture development of a project was undertaken jointly by USF and a builder. In substance, the joint venture was controlled by USF which had the responsibility for and received the profits from the development of the project.

C.R. 6257-6258. This enabled USF to recognize earnings although it may not have received any cash, only the notes from the joint venture partner.

panded its real estate operations with the acquisition of San Carlos Construction Co. and Duc and Elliott Development Company. Additionally, U.S. Guaranty Capital was formed to make interim construction loans.

USF continued its capital expansion in 1970 with another securities offering through U. S. Financial Overseas, N.V., a wholly-owned Netherland Antilles subsidiary of USF.[6] The offering was for $12.5 million in 9% debentures, due 1982, guaranteed by USF, and which came with attached warrants for the purchase of ten shares of USF common stock. During 1970 USF acquired three more companies, Development Creators, Inc., an architectural firm, Mosser Construction, Inc., an Ohio corporation engaged in heavy construction, and Shelton Corporation, a Hawaiian real estate company. In keeping with its rapid growth, USF common stock was listed on the New York Stock Exchange in December of 1970.

USF's capital growth continued in 1971 with the offering of $35 million of 5½% convertible subordinated debentures in this country. Unfortunately for its investors, 1971 was the last year of USF's phenomenal growth. USF's reported assets had risen from $338,795 in 1962 to more than $310 million in 1971, its revenues from $8,876 to more than $180 million, and its earnings from $1,215 to over $6 million. The price of USF common stock had also increased correspondingly. From a selling price of less than $5.00 per share it soared to $92.00 per share in 1969, and following a three for two split in 1969 it had risen to a price of $57.00 per share in 1971.

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[6]One of the purposes of the foreign offering was to avoid various registration requirements of the federal securities law. *In re U. S. Financial Securities Litigation,* 69 F.R.D. 24, 31 (S.D. Cal. 1975).

USF was a vertically-integrated company at the time of its downfall. It was in the business of developing, constructing, operating, marketing, and financing real estate projects, individually and as a "participant" in joint ventures. The construction and financing of the real estate developments were controlled through its subsidiary corporations. These various operations were further supplemented by USF's wholly-owned title insurance and casualty insurance companies.

Despite some problems in 1971, the collapse did not begin until 1972 after the SEC had begun investigating the USF operations.[7] In late 1972 the SEC suspended trading in USF securities altogether. At this time USF had approximately 4.5 million outstanding shares of common stock. In 1973, USF began a Chapter XI arrangement proceeding in bankruptcy which has since been converted into a Chapter X reorganization proceeding.

2. *Status of the Present Litigation*

On June 24, 1977, when the district court entered its order striking the demands for jury trial, there were eighteen consolidated cases.[8] Subsequently, certain plaintiffs brought additional claims, increasing the

[7]In 1971, USF's chief financial officer resigned after refusing to sign an SEC report because of his inability to determine the accuracy of the reported financial information. The SEC began inquiring into USF's accounting practices that same year after an article in a leading financial newspaper criticized the method by which USF accounted for its joint ventures. *See* n. 5, *supra*. A new outside accounting firm was hired and fired shortly thereafter when it was discovered that different auditing procedures would be used. After receiving USF's 1971 financial statements, in 1972 the SEC began its investigation in earnest into the USF operations.

[8]*See* Appendix A following the district court's decision at 75 F.R.D. 715-719.

total number of actions to twenty.[9] However, several of the cases have been settled and dismissed since the district court's order.[10] This court has been advised that there are ten cases remaining, four of which, while still pending, have never been, and are not now, being actively pursued.[11]

[9]The two new actions were: *Colonial Growth Shares, Inc. v. Brown, Wood, Fuller, Caldwell & Ivey, et al.*, Civil No. 77-0454-T (S.D. Cal.), and *Mellon Bank, N.A., et al. v. Brown, Wood, Fuller, Caldwell & Ivey, et al.*, Civil No. 77-457-T (S.D. Cal.).

[10]According to the "Joint Supplemental Brief of the Plaintiff-Appellants," the following cases have been settled and dismissed:

One Common Stock Class Action:
Penn Mart Realty Company v. U.S. Financial Inc., et al., Civil No. 74-281-T (S.D. Cal.).

Two Domestic Debenture Class Actions:
Michael Fabrikant, et al. v. Robert G. Stewart, et al., Civil No. 74-282-T and 74-283-T (S.D. Cal.).

Three Domestic Debenture Private Actions:
Decatur Income Fund, et al. v. Touche Ross & Co., et al., Civil Nos. 74-284-T, 74-285-T and 74-354-T (S.D. Cal.).

One Domestic Debenture and Common Stock Private Action:
Mellon Bank, N.A., et al. v. Touche Ross & Co., et al., Civil No. 74-288-T (S.D. Cal.).

One Domestic Debenture and Common Stock Private Action:
Mellon Bank, N.A., et al. v. Brown, Wood, Fuller Caldwell & Ivey, et al., Civil No. 77-457-T (S.D. Cal.).

One Common Stock Private Action:
Robert D. Kelce v. Touche Ross & Co. and Union Bank, Civil No. 75-1119 (S.D.Cal.).

One Injunction Proceeding:
Securities and Exchange Commission v. U.S. Financial, Inc., et al., Civil No. 74-92 (S.D. Cal.).

[11]The following cases are still pending, according to the "Joint Supplemental Brief of the Plaintiff-Appellants":

Society Generale De Banque, Rentinvest, North American Fund A and ITF Fund Ltd. v. Touche Ross & Co., Civil No. 74-569-T (S.D. Cal.).

Societe Generale De Banque, Rentinvest, North American Fund A and ITF Fund Ltd. v. Union Bank, Civil No. 75-1044-T (S.D. Cal.).

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Thus, there are six remaining active cases. The appellants maintain[12] that these six actions actually amount to only three separate prosecutions. The three remaining cases brought by Societe Generale De Banque, they contend, allege a single continuing scheme to defraud, causing damages to a class of debenture purchasers, by Touche Ross & Co., Union Bank, and Brown, Wood. Liability is predicated upon violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5, and also for common law fraud and negligence. The appellants contend that the two separate actions brought by Colonial Growth, and the one action by Bank

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Society Generale De Banque, Rentinvest, North American Fund A and ITF Fund Ltd. v. Brown, Wood, Fuller, Caldwell & Ivey and Brown, Wood Ivey, Mitchell & Petty, Civil No. 76-819-T (S.D. Cal.).

Colonial Growth Shares, Inc. v. Touche Ross & Co., et al., Civil No. 74-436-T (S.D. Cal.).

Colonial Growth Shares, Inc. v. Brown, Wood, Fuller, Caldwell & Ivey, et al., Civil No. 77-0454-T (S.D. Cal.).

First National Bank of Toledo, etc., et al. v. U. S. Financial Incorporated, et al., Civil No. 74-286-T (S.D. Cal.).

John Risque v. Robert Walter, Civil No. 73-312 (S.D. Cal.).

R. G. Stewart v. Touche Ross & Co., et al., Civil No. 74-452 (S.D. Cal.).

William H. Huff v. Touche Ross & Co., Civil No. 75-1107 (S.D. Cal.).

William Foote v. R. H. Walter, et al., Civil No. 73-508 (S.D. Cal.).

The last four cases listed are the ones which have apparently never been actively prosecuted. In the supplemental brief filed on behalf of the appellees, it is implied that the last two cases listed may have also been settled. Since these are two of the dormant cases, it is unnecessary to resolve the discrepancy between the briefs.

[12]For purposes of clarity, we refer to the appellants (who include both plaintiffs and defendants in the various cases in the district court and who are by far in the numerical majority on appeal) as those opposing the order striking the demands for jury trial. The appellees are those who argue in favor of the district court's decision and order.

of Toledo, are all based upon the same continuing scheme to defraud which forms the basis of the Societe Generale De Banque actions.

The appellees claim that the dismissals have done little, if anything, to reduce the complexity of the issues, the volume of the evidence, or the estimated length of trial. Furthermore, they contend that the nature and scope of the legal and factual issues remain basically the same as they were before any settlements were reached. The trier of fact will still have to decipher the financial statements and accounting procedures of USF for the period from 1966 through 1972. Since differing degrees of difficulty and complexity would not alter our ultimate decision, we accept the appellees' representations.

3. *District Court Decision*

In a carefully thought out opinion the district court presents a persuasive argument as to why there should be an exception to the Seventh Amendment right to jury trial in this type of case. The practical difficulties created by the size and scope of these consolidated cases are vividly illustrated.[13] Nevertheless, such practical considerations diminish in importance when they come in conflict with the constitutional right to a jury in civil cases.

The court, under the compulsion of the Seventh Amendment guarantee, acknowledged that the right to jury trial was dependent upon the legal or equitable classification of the case. After quoting several English

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[13]The court *estimated* that the fact-finder will need to read over 100,000 pages of paper which would be the equivalent of reading the first 90 volumes of the Federal Reporter, 2d Series. It was further estimated that the trial would take at least two years. Concern was also expressed as to where a courtroom could be found to seat all of the attorneys, let alone the parties to the case.

and American court decisions with approval for their disparaging remarks about the abilities of juries,[14] the court then reasoned somewhat as follows: If this case falls within equity jurisdiction, then there is no right to jury trial. Equity has jurisdiction over cases in which there is no adequate remedy at law. The inability of juries to handle complex cases and render a fair decision means that there is no adequate remedy at law. Therefore, complex cases are within equity jurisdiction and there exists no right to jury trial in them.

Support for this reasoning is drawn from *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), and *Ross v. Bernhard,* 396, U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). In *Dairy Queen,* the court made the observation that a plaintiff may bring an action for an equitable accounting only when it can be shown ". . . that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." 369 U.S. at 478, 82 S.Ct. at 900. And, in the *Ross* decision the court noted that one of the factors used in determining whether a case was legal or equitable was ". . . the practical abilities and limitations of juries." 396 U.S. at 538, n.10, 90 S.Ct. at 738, n.10 (referred to as *Ross* footnote).

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[14]For instance: ". . . the Court was better able to judge then [sic] a jury of ploughmen. . . ." *Clench v. Tomley,* 21 Eng.Rep. 13 (1603); "[i]t is unfair to a litigant to have his case determined by a tribunal [a jury] which cannot fulfill that duty with accuracy or justice, however intelligent and desirous of doing their full duty the tribunal may be." *Bennet v. United Lumber and Supply Co.,* 110 Conn. 536, 538, 148 A. 369 (1930); "[i]t would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion . . ." *Kirby v. Lake Shore & Michigan Southern Ry.,* 120 U.S. 130, 134, 7 S.Ct. 430, 432, 30 L.Ed. 569 (1887).

The decision then takes a quantum leap and establishes some general guidelines as to when the "complexity exception"[15] will deny to a litigant his constitutional right to a civil jury trial. These are:

> "First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury resolution. Although such problems often arise only during the damages portion of a trial, they sometimes are present during the liability portion as well . . . only a case in which such a special master could not assist the jury meaningfully may be subject to removal from the province of the jury because of complex accounts.
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> "Second, the jury members must be capable of understanding and of dealing rationally with the issues of the case.
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> "And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for the jurors to function effectively throughout the trial."

75 F.R.D. at 711. The court found the first two guidelines satisfied based on its conclusion that a jury was not capable of either understanding or rationally reconciling the mass of data, the variety of legal theories, and the number of parties involved in the case. Since the trial time was estimated at two years, the court concluded that it would be very difficult to find a jury which could sit for that long.

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[15]The court below did not refer to its rule as an exception to the Seventh Amendment since it did utilize the legal/equitable test for determining when the right would apply. We recognize that in *form* alone it may not be an exception, but the *reality* or *substance* of the rule does create an exception. And so we choose to refer to it in that manner.

4. *Other District Courts*

Recently, five other district courts have also faced the question of whether jury trial should be denied in complex cases.[16] The focal point of the various inquiries has centered around the previously-mentioned footnote from the *Ross* decision and its consideration of the practical abilities and limitations of juries. Agreeing with the court below, thus far three of the other five courts have also found a "complexity exception" to the Seventh Amendment.

First in this line of decisions was the case of *In re Boise Cascade Securities Litigation,* 420 F.Supp. 99 (W.D.Wash.1976). The district court struck the demands for a jury trial because of the complicated nature of the accounting and securities issues. The order was based upon the *Ross* footnote which the court found to be of "constitutional dimensions." And the court also relied in part upon the due process clause which it found required fairness in decision-making, something which a jury was incapable of doing in a case of *Boise Cascade's* complexity.

The plaintiff in *Radial Lip Mach., Inc. v. Intern. Carbide Corp.*, 76 F.R.D. 224 (N.D. Ill. 1977), moved to strike the defendants' demand for jury trial. *Radial Lip* was a complicated trademark and patent infringement case with claims and counterclaims seeking a wide variety of legal and equitable relief. Faced with the argument based upon the *Ross* footnote, the court

[16]Two other district courts have also discussed the issue in brief opinions. In *Jones v. Orenstein*, 73 F.R.D. 604 (S.D. N.Y.1977), the court refused to strike the jury demand in a securities fraud case. And, in *S.E.C. v. Associated Minerals, Inc.*, 75 F.R.D. 724 (E.D.Mich.1977), the court struck the jury request relying primarily on the equitable nature of the injunctive relief sought by the S.E.C.

reasoned that this did not mean that the practical abilities and limitations of juries operated as an exception to the Seventh Amendment. The court also rejected the contention that the case was of such extraordinary complexity that only a court of equity could unravel the issues.

The court, in *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y.1978), on its own motion, struck the plaintiffs' demand for jury trial. Various composers and lyricists brought *Bernstein* as a class action, alleging various antitrust violations. The court based its decision on what were viewed as the court's traditional equity powers, which were found to include ". . . the power to strike a jury demand when to allow it to stand would work an injustice." 79 F.R.D. at 66. Relying principally on the *Ross* footnote, the court concluded that ". . . the sheer size of the litigation and the complexity of the relationships among the parties render it *as a whole* beyond the ability and competence of any jury to understand and decide with rationality." 79 F.R.D. at 70.

In another decision from a district court in this circuit, an order was entered striking a jury demand. *ILC Peripherals v. International Business Machines,* 458 F.Supp. 423 (N.D.Cal.1978).[17] *ILC Peripherals* was a complicated antitrust case where the court, after dismissing a hopelessly deadlocked jury, entered a di-

[17]This case is currently pending on appeal before this court. Nothing that we say in this opinion should be taken as a comment on the merits of that case. However, later in this opinion we do address an argument which is based on a remark made by one of the jurors in that case. By an order entered August 23, we allowed International Business Machines Corporation to file an Amicus Curiae brief because of its interest in the jury trial question resulting from the *ILC Peripherals* case.

rected verdict in favor of the defendant. As part of its decision, the court entered an order striking the jury demand in the event of a remand for a retrial. The court relied principally on the *Ross* footnote:

> "It is the third factor of the equation, the practical abilities and limitations of jurors, that causes the court to conclude that the issues in this case must be considered to be equitable."

458 F.Supp. at 445. Where the issues are beyond the abilities of a jury, the court reasoned, the legal remedy becomes inadequate and equity jurisdiction attaches. Unlike any of the other district court decisions on this issue, the *ILC Peripherals* court based its decision upon "its own observations during the five month trial." 458 F.Supp. at 447.

The most exhaustive analysis of the jury issue by any court was the recent opinion, ***In re: Japanese Electronic Products Antitrust Litigation,*** 478 F.Supp. 889 (E.D.Pa.1979).[18] In the consolidated cases which were described as "so massive as to make them unique in the annals of United States antitrust and trade regulation litigation," the district court refused to strike the plaintiffs' jury demands.[19]

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[18]Judge Becker's scholarly decision is over one hundred pages in length, and is possibly the only decision with its own table of contents.

[19]The best summary of this decision was by the author himself in his conclusion where he said:

> "This opinion has addressed a number of questions in order to determine whether the Seventh Amendment right to trial by jury applies even in a case so massive and so complex that serious questions of jury competence may be raised.
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> "Because the historical test for the Seventh Amendment defines the parameters of the constitutional right to a jury trial by reference to English practice in 1791, we have explored the traditional boundaries of the jurisdictions of courts of law and courts of equity. Our survey demonstrated that some cases normally belonging to the courts of common law could, if sufficiently complex, be brought in equity. But this was possible only in actions seeking an 'accounting,' and only at the plaintiff's option. Because this is not an 'accounting' case, and because here the plaintiffs actively seek a jury trial, the historical test requires that a jury be available. This conclusion is buttressed by other considerations as well. There is little evidence that the plaintiff's historical ability to bring complex accounting matters to a court of equity was attributable to considerations of jury competence and, in any event, it may not have survived the merger of law and equity. Moreover, the remedy of treble damages sought in the case before us is one which was traditionally available *only* on the verdict of a jury in a court of common law.
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> "We next examined the Supreme Court's recent decisions in order to determine whether questions of jury competence had been elevated to constitutional stature by the mention in *Ross v. Bernhard* of 'the practical abilities and limitations of juries.' We determined that to so read the *Ross* dictum would be inconsistent with the intentions of the Supreme Court, with settled principles of jurisprudence, and with the very policies expressed in the Seventh Amendment itself. We have concluded, therefore, that the complexity of the case before us is not a constitutionally permissible reason for striking the plaintiffs' jury demands." At 942.

[20]We recognize the principle that this court must first ascertain whether it is possible to construe whatever statute is involved in a case so as to avoid the constitutional question. *Curtis v. Loether,* 415 U.S. 189, 192 n.6, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). The parties do not even consider this in their briefs, nor does this court need to be detained long by it. The present case is primarily based upon the federal securities law which does not contain any indication whether jury trial should be allowed in private civil damage actions under its provisions. *See generally* 15 U.S.C. § 77a, *et seq.* In the absence of any wholly statutory grounds, we must therefore look to the constitutional question under the Seventh Amendment.

III. *DISCUSSION*

Analytically, we are faced with three different arguments as to why the Seventh Amendment right should not apply to this class of complex civil cases.[20] The

first approach follows the historical legal-equitable test. Complex commercial litigation, such as the present case, is analogized to an "equitable accounting," where there was no right to jury trial. The second argument, based upon the *Ross* footnote, asks the court to adopt a new interpretation of the Seventh Amendment and examine the practical abilities and limitations of juries. The final argument claims that due process requires trial by the court when a jury cannot comprehend the issues and evidence in the case. After a short explanation of the historical background of the Seventh Amendment, we will address each of these arguments.

1. *Historical Background*

Throughout this country's history, the Seventh Amendment and the right it is designed to guarantee, has engendered neither the controversy nor the litigation that has surrounded some of the other nine Amendments forming the Bill of Rights. Nevertheless, the importance of the civil right to jury trial should not be underestimated.[21]

The right to jury trial arrived on the shores of this country with the first English colonists.[22] The original Jamestown charter guaranteed all the rights of Englishmen to the colonizers, including trial by jury.[23] During the next two hundred years of development in colonial America, the right to jury trial contin-

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[21]For an excellent discussion of the historical background of the Seventh Amendment, see Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639 (1973) (hereinafter referred to as Wolfram).

[22]Simon, *Introduction* to The Jury System in America at 15 (1975).

[23]Hyman and Torrant, *Aspects of American Trial Jury History,* in The Jury System in America at 24-25 (1975).

ued to expand.[24] The principles embodied in jury trials found a receptive atmosphere in the egalitarian principles of the colonists. By 1776, the right to jury trial existed, in one form or another, in each one of the thirteen colonies.[25] In fact, one of the primary grievances against England at the time of the Declaration of Independence was the restriction on the right to jury trial.[26] Colonial administrators had been circumventing the right by trying various cases, both criminal and civil, in the vice-admiralty courts.[27]

When the Constitution was finally drafted, there was limited debate as to whether the civil right to jury trial should be included.[28] The lack of this guarantee formed one of the primary arguments against the adoption of the new Constitution.[29] The right to jury trial in civil cases, embodied in the Seventh Amendment,

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[24]*Id.*

[25]Wolfram, *supra* n. 21, at 655.

[26]*Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 340, 99 S.Ct. 645, 58 L.Ed.2d 552 (Rehnquist, J., dissenting), and sources cited therein.

[27]Wolfram, *supra* n.21, at 654 n.47.

[28]Wolfram, *supra* n.21, at 657-661.

[29]During the debates on its adoption, Alexander Hamilton noted that "[t]he objection to the [Constitution], which has met with the most success . . . is *that* relative to *the want of a constitutional provision* for the trial by jury in civil cases." *The Federalist* No. 83, p. 558 (J. Cooke ed. 1961). And, as Justice Story observed in 1830:

> "One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

Parsons v. Bedford, 3 Pet. 433, 28 U.S. 433, 446, 7 L.Ed. 732 (1830).

then became one of the chief reasons supporting the adoption of the Bill of Rights.

This does not mean that juries were not without their detractors. The Federalists generally opposed juries and the Seventh Amendment. Since their arguments did not carry the day, we do not believe that we should give much credence to the Federalists' opinions about the abilities of juries as suggested on appeal.[30]

The preceding brief historical sketch serves to illustrate the significance of the civil right to a jury. Additionally, certain general considerations pertaining to the nature and construction of the Seventh Amendment further dramatize the importance attached to it.

In *Jacob v. City of New York,* 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942), the Supreme Court noted that;

[30]For instance, the following passage is cited from Hamilton's discussion as to why it was unnecessary for the Constitution to guarantee a right to jury trial in civil cases:

> "[T]he circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.
>
> ". . . [T]he attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from the courts of chancery, on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode."

The Federalist No. 83, pp. 569-70 (J. Cooke ed. 1961).

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

315 U.S. at 752-753, 62 S.Ct. at 854. The Court has also explained that:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care."

Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed.2d 603 (1935), *quoted with approval in Beacon Theatres v. Westover,* 359 U.S. 500, 501, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). With these general considerations in mind, we turn to the question of whether the Seventh Amendment protects the right to jury trial in the present case.[31]

2. *Historical Approach*

Whenever a court is called upon to interpret the Constitution, its analysis must begin with the language of the constitutional provision which it is called upon to interpret. Initially, we must therefore look to the Seventh Amendment which provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right

[31]It should also be noted that Fed.R.Civ.P. 38(a) provides that:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

The surface simplicity of this provision is beguiling for the exact scope of its application was unclear even when it was first adopted.

The Seventh Amendment "preserved" the right to jury trial in all suits "at common law." The basic purpose behind it was to maintain the right to jury trial as it existed when the Amendment was adopted in 1791. Because the Amendment speaks in terms of preservation, an historical test has been employed to determine its application. And since it refers to the common law, reference is made to the English practice as the source of this country's common law.[32]

The classic explanation of what was meant by "common law" was made by Justice Story almost one hundred fifty years ago:

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[32]It is an interesting question as to why reference is made to English practice, rather than the practice as it existed in the United States. The first statement of this rule was by Justice Story on Circuit in 1812, when he said:

"Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law."

United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D.Mass. 1812). The best explanation comes from one commentator who made the following observation:

"No federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious."

Wolfram, *supra* n. 21, at 641.

"The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law they meant what the Constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. . . In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

Parsons v. Bedford, 3 Pet. 433, 28 U.S. 433, 446-447, 7 L.Ed. 732 (1830).

The right to jury trial does not depend on the character of the overall action but instead is determined by the nature of the issue to be tried. *Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). Thus, there is a right to jury trial when the issue presented in a case would have been heard at common law. And conversely, there is no right when the issue presented in a case, viewed historically, would have been tried in the courts of equity, or in some other manner without a jury.[33]

Thus, the basic consideration in determining when the right to jury trial applies depends on the ancient

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[33]Wright and Miller, Federal Practice and Procedure 14-15 (1971).

distinction between law and equity. Since the merger of law and equity in 1938, some have stated that this is the only area where the distinction has any further significance. *Groome v. Steward,* 79 U.S.App. D.C. 50, 142 F.2d 756 (D.C.Cir.1944).

Although the primary test depends upon the distinction between law and equity, courts are not rigidly bound to the procedural rules and forms of action as they existed in 1791. Several procedural devices developed and expanded since 1791 have infringed upon the civil jury's historic role; nevertheless, they have been found consistent with the Seventh Amendment.[34] Conversely, other procedural developments have limited the scope of equity jurisdiction, and expanded the right to jury trial.[35] Additionally, it is too obvious to be doubted that the constitutional right to jury trial attaches to statutory causes of action as long

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[34]In *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Court held that expanded use of collateral estoppel did not violate the Seventh Amendment. Other cases relied upon were:

> *Galloway v. United States,* 319 U.S. 372, 388-393, [63 S.Ct. 1077, 1086-88, 87 L.Ed. 1458] (a directed verdict does not violate the Seventh Amendment); *Gasoline Products Co. v. Champion Refining Co.,* 283 U.S. 494, 497-498 [51 S.Ct. 513-14, 75 L.Ed. 1188] (retrial limited to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co. v. United States,* 187 U.S. 315, 319-321, [23 S.Ct. 120, 121-22, 47 L.Ed. 194] (summary judgment does not violate the Seventh Amendment).

439 U.S. at 336, 99 S.Ct. at 654.

[35]*See Ross v. Bernhard,* 396 U.S. 531, 540-542, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) (stockholder derivative suit); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 478, 82 S.Ct. 894, 8 L.Ed. 2d 44 (1962) (equitable accounting); *Beacon Theatres v. Westover,* 359 U.S. 500, 508-511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) (clean up doctrine).

as they involve legal rights and remedies.[36] Thus, the historical test is not static, rather it is more in the nature of an historical inquiry, an inquiry which is guided by the statutory expansion of legal rights, and the procedural developments which have both expanded and retracted the role of the civil jury.

Returning to the present case, the appellees do not seriously contest the fact that the issues presented here are basically of a legal nature.[37] The remedy which is sought in all of the consolidated cases is damages, which is the traditional form of relief granted by the common law courts. The substantive rights asserted are, in part, based on the common law principle of fraud and negligence. The statutory rights under the securities laws (principally Section 10(b) of the Securi-

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[36]*Curtis v. Loether,* 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). We believe that the reasoning Justice Marshall used in holding that there was a right to jury trial in private actions under Title VIII of the Civil Rights Act of 1968 is equally applicable to the present actions brought under the federal securities law:

> "We think it is clear that a damage action under § 812 is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions. See, *e.g., Ross v. Bernhard, supra,* [396 U.S.] at 533, 542, [90 S.Ct. 733, 735, 740]; *Dairy Queen, Inc. v. Wood, supra,* [369 U.S.] at 476-477 [82 S.Ct. 894, 899]. A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law," (footnotes omitted)

415 U.S. at 195-196, 94 S.Ct. at 1009.

[37]In one of the briefs from the appellees, we are asked to characterize fraud as historically involving neither solely a legal issue nor solely an equitable issue, and to characterize damages as not really a legal remedy in this case. The sophistic reasoning required to reach these characterizations does not withstand analysis under any prior Seventh Amendment experience.

ties Exchange Act of 1934 and the rules and regulations which form its progeny) merely create new legal duties. An action seeking damages from a breach of any of these statutory duties is analogous to a tort action at common law. From this it is clear that the present cases, where legal relief is sought and legal rights are asserted, involve suits either at common law or analogous to common law actions where the Seventh Amendment preserves the right to jury trial.[38]

Nevertheless, the appellees claim that due to the complexity of the present case, it is analogous to an action for an equitable accounting where historically there has been no right to a jury.

This argument misses the mark. It attempts to have the legal or equitable nature of the case characterized as a whole rather than by examining the nature of the issues involved. As previously pointed out, the issues presented here are of a legal nature. The fact that resolution of the issues will involve an examination of USF's accounts, and accounting procedures, cannot transform the case into an action for an equitable accounting.[39]

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[38]The circuit courts which have considered the applicability of the Seventh Amendment right to jury trial in private civil actions for damages under the securities laws have proceeded as if such a conclusion were obvious. *See Aid Auto Stores, Inc. v. Cannon,* 525 F.2d 468, 469 n. 1 (2d Cir. 1975); *Johns Hopkins University v. Hutton,* 488 F.2d 912, 916 (4th Cir. 1973), *cert. denied,* 416 U.S. 916, 94 S.Ct. 1623, 40 L.Ed.2d 118; *Hohmann v. Packard Instrument Co., Inc.,* 471 F.2d 815, 819 (7th Cir. 1973); *Dasho v. Susquehanna Corp.,* 461 F.2d 11, 24, 31 (7th Cir. 1972), *cert. denied,* 408 U.S. 925; 92 S.Ct. 2496, 33 L.Ed.2d 336; *Myzel v. Fields,* 386 F.2d 718, 740-41 (8th Cir. 1967), *cert. denied,* 390 U.S. 951, 88 S.Ct. 1043, 19 L.Ed.2d 1143; *cf. Arthur Young & Co. v. United States District Court,* 549 F.2d 686, 690 (9th Cir. 1977), *cert. denied,* 434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88.

[39]In fact, the court below, relying upon *United States v. Bitter Root Development Co.,* 200 U.S. 451, 26 S.Ct. 318, 50 L.Ed. 550 (1906), and *Curriden v. Middleton,* 232 U.S. 633, 34

The Supreme Court rejected a similar argument in *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). The plaintiff there had brought an action for an injunction restraining an alleged patent infringement and for an accounting for profits lost through the infringement. The Court decided that the plaintiff's characterization of the case as an action for an equitable accounting was of no consequence. The true basis of the action, the Court found, was on a "debt allegedly due under a contract . . . [or] for damages . . ." 369 U.S. at 477, 82 S.Ct. at 899. The opinion went on to note that in view of the ability of masters to assist the jury in complicated cases, it would be extremely difficult to satisfy one of the prerequisites for bringing an equitable accounting; that is, a showing that the accounts between the parties are of such a complicated nature that only a court of equity could unravel them.[40]

S.Ct. 458, 58 L.Ed. 765 (1914), correctly concluded that mere complication of facts was not sufficient to confer equity jurisdiction based on an equitable accounting theory. 75 F.R.D. at 709.

[40]The entire passage where Mr. Justice Black discussed the equitable accounting argument is instructive and so it is quoted at length:

> "The respondents' contention that this money claim is 'purely equitable' is based primarily upon the fact that their complaint is cast in terms of an 'accounting,' rather than in terms of an action for 'debt' or 'damages.' But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres,* the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them. In view of the powers given to District Courts by Federal Rule of Civil Procedure

(This footnote is continued on next page)

A suit for an "accounting" was a narrow and little-used ground for establishing equitable jurisdiction.[41] The present actions do not involve any claims for an equitable accounting. The questions in this case are of a legal character traditionally heard at common law. The fact that a case may involve accounting principles cannot magically convert the legal causes of action into an action for an equitable accounting.

3. *The Ross Test*

As we discussed earlier in this opinion, the *Ross v. Bernhard,* 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), decision has been interpreted by some courts and commentators as establishing a new test for determining the right to jury trial.[42] The court below held, and the appellees argue, that *Ross* establishes a test under which a court must inquire into the practical abilities and limitations of juries in resolving the Seventh

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53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. But be that as it may, this is certainly not such a case. A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two. *The legal remedy cannot be characterized as inadequate merely because the measure of damages may necessitate a look into petitioner's business records.*" (footnotes omitted and emphasis added)

369 U.S. at 477-479, 82 S.Ct. at 899-900.

[41] *See* Note, 20 B.C.L.Rev. 511, 528-529 (1979).

[42] *See In re Boise Cascade Securities Litigation,* 420 F.Supp. 99 (W.D.Wash.1976); *Bernstein v. Universal Pictures, Inc.,* 79 F.R.D. 59 (S.D.N.Y.1979); *ILC Peripherals v. International Business Machines,* 458 F. Supp. 423 (N.D. Cal. 1978); Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm,* 28 Hast. L.J. 1 (1976); Note, 83 YaleL.J.401 (1973); Note, 10 Conn.L.Rev. 775 (1978); Note, 92 Harv. L. Rev. 898 (1979).

Amendment question. We do not believe that *Ross* may be read as establishing a new test for determining when the Seventh Amendment applies.

In *Ross,* the plaintiffs had brought a stockholders' derivative suit against the directors of an investment company and the company's brokers. The complaint alleged statutory violations of the Investment Company Act of 1940, breach of fiduciary duties, and requested that the defendants return their profits to the company. Despite the fact that stockholders' derivative suits were historically only recognized in equity, the Court held that ". . . the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury." 396 U.S. at 532-533, 90 S.Ct. at 735. The Court viewed the prior rule which only allowed derivative suits to be brought in equity as merely a procedural obstacle which was "destroyed" by the merger of law and equity under the Federal Rules of Civil Procedure.

For our purposes here, the most important part of the *Ross* decision came during the discussion of *Beacon Theatres v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), where the court said this:

> "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall actions.[10]"

396 U.S. at 538, 90 S.Ct. at 738.

This statement was explained in footnote 10 as follows:

> "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions;

second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly obtruse historical inquiry, is obviously the most difficult to apply. See James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963)."

Based on this footnote, this court is asked to employ an inquiry into the practical abilities and limitations of a jury as the test for determining the application of the Seventh Amendment. We decline this invitation for several reasons.[43]

While it is unclear as to what was meant by the inclusion of the third factor, we do not believe that it stated a rule of constitutional dimensions. After employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote.[44]

Another consideration involves the two sources cited for the rule: the vague reference to "our cases" and the *James* article. No Supreme Court decision prior to *Ross* ever utilized a test even partially dependent upon an inquiry into the abilities of jurors. The only occasions even remotely resembling such an inquiry are the equitable accounting cases, the significance of which *Dairy Queen* limited practically to the point of extinction.[45] The *James* article also fails to add any support to the use of the third factor, and, if

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[43]Initially, we observe that footnote 10 of *Ross* was dictum totally unnecessary to the Court's holding. As such, it is not binding on this court.

[44]*See* Wright, Law of Federal Courts 454 (3d ed. 1976).

[45]*See* n.40, *supra.*

anything, it counsels against such an inquiry. James explains that under the Constitution, judges are not free to examine what issues may be best suited for resolution by a judge or by a jury.[46]

While the Supreme Court has never specifically repudiated the third factor in the *Ross* footnote, it has never met with general acceptance by the courts.[47]

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[46]The entire discussion on this follows:

"(a) *An eclectic test.* No one has explicitly suggested re-examination of the whole matter with a view to determining what issues or types of issues are best fitted for court trial or jury trial. If all were *tabula rasa,* and some solon were trying to devise an ideal system for the administration of justice, he would probably approach the jury trial problems with just such an inquiry in mind. And it may well guide the future course of those charged with amending or recasting constitutions or, within narrower compass, of legislators. But as a guide for *judicial,* as opposed to political, action in the matter any such test meets serious difficulties. *For one thing the constitutions themselves, as we have seen, impose a different test (namely an historical test which was never guided, even in the making, by the consideration here suggested as ideal).* Furthermore, even if the matter is left to the people acting through their legislators, they lack any scientific way of telling what issues are best suited for jury or for court trial, and there is no general agreement (among judges, among politicians, within the profession, or in the community at large) about the matter or even about the underlying premises that should be assumed in making the evaluation. These difficulties seem to this writer quite insurmountable and indeed they should, it is submitted, inhibit judges from feeling free to take the bit in their teeth. Nevertheless it is natural and inevitable that a court's own value judgments will influence its decisions in close and doubtful cases." (footnotes omitted and emphasis added)

James, *Right to Jury Trial in Civil Actions,* 72 Yale L.J. 655, 690-691 (1963).

[47]Writing prior to the district court decisions which have used the *Ross* footnote to strike jury demands (see discussion of the *Boise Cascade, Bernstein,* and *ILC Peripherals* cases at Part II, section 4 of this opinion), Professor Wright explained

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In the *Ross* decision itself, the Court did not consider the practical abilities and limitations of juries. And, although the Supreme Court has considered the Seventh Amendment question in depth on at least five occasions since *Ross*, the abilities of juries have never been considered.[48] The subsequent decisions have all relied upon the traditional historical test.

Another factor which militates against our adoption of a new interpretation of the Seventh Amendment is our belief that it would be totally at odds with prior Seventh Amendment experience.[49] To consider

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that although some lower courts had paid lip service to the third factor:

> "[c]ertainly there is no indication in the cases that the courts are adopting a balancing test, and weighing the practical abilities and limitations of jurors, to displace the traditional tests for when an issue is triable to a jury."

Wright, Law of Federal Courts 454 (3d ed. 1976). And last spring one writer noted that:

> ". . . the majority of courts that have applied the *Ross* test have either ignored the third element [the practical abilities and limitations of juries] or determined that the claims presented were not beyond the analytical ability of a jury."

Note, 20 B.C.L. Rev. 511, 518 (1979).

[48]*See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Atlas Roofing Co. v. Occup. Safety Comm'n,* 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977); *Pernell v. Southall Realty,* 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974); *Curtis v. Loether,* 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Colgrove v. Battin,* 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

In fact, the Seventh Circuit's decision expressly considered the "practical abilities and limitations of juries" in *Loether. Rogers v. Loether,* 467 F.2d 1110, 1118 (7th Cir. 1972), *aff'd sub nom., Curtis v. Loether,* 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), and yet the Supreme Court did not even mention this factor in its decision.

[49]One commentator noted that the *Ross* footnote:

> ". . . is so cursory, conclusory, and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent."

the practical abilities and limitations of juries within the context of complex cases would necessitate an examination of the whole case. However, the Seventh Amendment right has never been made dependent upon such an examination; it has always been the nature of the issue.[50] When a case involves mainly equitable issues and only incidental legal issues, the right to jury trial still attaches to the legal issues.[51] Under Seventh Amendment jurisprudence, an historical approach must still be followed.[52] Thus, we conclude that *Ross* may not be read as establishing a functional interpretation of the Seventh Amendment.[53]

Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making,* 70 Nw.U.L. Rev. 486, 526 (1975). And another commentator has explained it in this way:

> "Standing as it does, thus alone, this fleeting expression in *Ross v. Bernhard* of infidelity to the centrality of the traditional historical test in seventh amendment determinations would hardly justify an announcement that the historical test has been superseded in the Federal courts."

Wolfram, *supra* n.21, at 645.

[50]*Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970).

[51]*Dairy Queen v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962).

[52]Writing for the Second Circuit, Judge Friendly also refused to read *Ross* as establishing a new test under the Seventh Amendment:

> ". . . the footnote in *Ross v. Bernhard* was part of an argument for applying the Seventh Amendment right to a jury trial where it had not been recognized before the merger of law and equity—not a suggestion that a type of statute which had uniformly been held to carry the right of jury trial should now be construed to eliminate it.

United States v. J. B. Williams Company, Inc., 498 F.2d 414, 428 (2d Cir. 1974).

[53]The Supreme Court has used a functional approach in determining the right to jury trial in criminal cases; however, that right is secured by the Sixth rather than the Seventh Amendment. In interpreting the Sixth Amendment, the Court

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4. *Due Process*

The appellees argue that their rights to due process under the Fifth Amendment would be violated if this case were tried to a jury. Because of the size and magnitude of the present litigation, they reason that a jury could not reach a rational decision. According to one of the briefs, due process dictates that a jury should not be required when the facts and issues are beyond a jury's comprehension.[54]

We assume, without deciding, that there is such a right to a "competent" fact-finder. However, we do not agree with the two assumptions upon which this argument is based, that is, the complexity and the inability of a jury to serve as fact-finder.

It should be noted that both of the arguments, discussed previously under the historical approach and the *Ross* test, shared the same underlying premise.

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has rejected a historical test, concluding that "there [is] no indication that the Framers intended to preserve in the Constitution the features of the jury system at common law." *Burch v. Louisiana,* 441 U.S. 130, 135, 99 S.Ct. 1623, 1626, 60 L.Ed.2d 96 (1979). Instead, the Court has chosen to examine "the function that the particular feature performs and its relation to the purposes of the jury trial." *Williams v. Florida,* 399 U.S. 78, 99-100, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446 (1970). In essence, the appellees argue that this type of functional approach, based on the *Ross* footnote, should be taken under the Seventh Amendment. However, in the absence of any direction from the Court that treatment of the right secured by the Seventh should parallel that secured by the Sixth, we reject any suggestion that we draw such an analogy here.

[54]There is also a suggestion of a due process problem because business people and professionals would be unable to take the time to serve as jurors because of the length of complex antitrust and securities trials. This, so the theory goes, deprives the parties of a fair cross section of the community. However, parties are only entitled to a jury which is *drawn* from a fair cross section, not a jury which is a mirror image of the community. *See* 28 U.S.C. § 1861; *United States v. Ross,* 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied,* 410 U.S. 989, 93 S.Ct. 1500, 36 L.Ed.2d 188.

With the historical approach, had we found this case analogous to an equitable accounting, then an inquiry into the ability of a jury in complex cases would have been necessary; just as it would were we to follow the suggested *Ross* test. Because of the manner by which we approached those arguments, it was unnecessary to examine the abilities of juries in complex cases since we did not reach that step in their arguments. Had we found it necessary at that point to resolve the jury competence issue under either one of those arguments, we would have done so in the same manner as we do in the following discussion; that is, a jury *is* a competent fact-finder in complex cases.

A. Complexity

Many cases appear overwhelmingly complicated in their early stages. Nevertheless, by the time such cases go to trial, what had initially appeared as an impossible array of facts and issues has been synthesized into a coherent theory by the efforts of counsel. Moreover, in answering the Seventh Amendment question, courts should take into consideration the various procedural developments which serve to simplify and facilitate the trial of a "complex" case to a jury.[55]

The assumption that attorneys cannot develop and present complex cases to a jury underestimates the abilities of the bar, especially the experienced and capable counsel associated with the present litigation. Whether a case is tried to a jury or to a judge, the task of the attorney remains the same. The attorney must organize and assemble a complex mass of informa-

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[55]*See Ross v. Bernhard,* 396 U.S. 531, 540-542, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 478, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres v. Westover,* 359 U.S. 500, 508-511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).

tion into a form which is understandable to the uninitiated. In fact, one judge has suggested attorneys may do a better job of trying complex cases to a jury than to a judge.[56]

Also, the trial judge has the power and the authority to control, manage and direct the course of complex cases. The Federal Judicial Center developed the *Manual for Complex Litigation* for just such cases.[57] The *Manual* is designed to provide for the fair, firm, and efficient judicial control of complex litigation. *Id.* p. IV. A district judge is not left in the position of a captain whose ship, lacking a rudder and throttle, proceeds at its own speed in its own direction. Instead, the *Manual* encourages and provides suggestions as to how the district judge should exercise control over the parties and give the case direction.

Various occurrences prior to trial may assist in simplifying the overwhelmingly complex case. *Tights, Inc. v. Stanley,* 441 F.2d 336, 339-340 (4th Cir. 1971),

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[56]Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power,* 56 Tex.L.Rev. 47, 54-55 (1977) (hereinafter referred to as Higginbotham). Judge Higginbotham is a United States District Judge for the Northern District of Texas.

[57]It is worthy of noting how the jury trial question was treated in the *Manual.* Although it was prepared with cases as complex as the present in mind, there is no suggestion, or anything from which even the most tenuous inference may be drawn, that the trial judge may consider striking a demand for jury trial. When the *Beacon Theatres* and *Ross* decisions are mentioned, it is in the following context:

> "Caution: Make sure that the requirements for jury trial enunciated in Beacon Theatres, Inc. v. Westover, or *Ross v. Bernhard,* are not violated in ordering trial of a separate issue." (footnotes omitted)

Manual, supra at 139-140. In fact, when the *Manual* is read as a whole, it becomes apparent that its pervasive theme is how complex cases should be tried to a jury rather than why they should not.

cert. denied, 404 U.S. 852, 92 S.Ct. 90, 30 L.Ed.2d 91. A motion under Fed.R.Civ.P. 12 may be used to test the sufficiency of an adversary's pleadings. The facts may become sufficiently clear on some issues to entitle a party to have judgment entered as a matter of law under Fed.R.Civ.P. 56. The parties may stipulate to the admissibility of evidence, or to the facts themselves, thus reducing the time necessary to present a case at trial. The trial court could also order separate trials on some of the claims or issues under Fed.R.Civ.P. 42(b).[58] And, as it is apparent from the present case, many cases or issues may be settled prior to trial.[59]

When a case involves complicated issues, the trial judge may appoint a master under Fed.R.Civ.P. 53(b) to assist the jury.[60] In referring matters, the court has considerable discretion in deciding what the master should undertake to report upon. Fed.R.Civ.P. 53(c). We recognize that use of masters in jury cases is ". . . the exception and not the rule. . . ," because

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[58]The argument is raised by some of the briefs that, assuming a complexity exception to the Seventh Amendment, a court should not, by its own actions, be allowed to create the very condition, i.e., complexity, which makes jury trial impossible, In the present case, they claim that it was the order of consolidation, not the issues, which created the complexity. We doubt whether the discretionary command of Fed.R.Civ.P. 42(a) (allowing consolidation) can be read as limiting the mandatory command of Fed.R.Civ.P. 38 (preserving the right to jury trial). *See* 28 U.S.C. § 2072 also. Consolidation cannot alter the rights of the parties. *Johnson v. Manhattan Ry. Co.,* 289 U.S. 479, 496-497, 53 S.Ct. 721, 77 L.Ed. 1331 (1933). As we are now ruling that the Seventh Amendment requires a jury trial in even the most complex cases at law this argument is no longer relevant to the decision of this case.

[59]*See* n.10, *supra.*

[60]The court below concluded that a special master would not be feasible for assisting the jury, but would be of assistance if the case were tried to the court. *Compare* 75 F.R.D. at 713 *with* 715. We fail to see why a master could not render meaningful assistance to a jury.

they do represent a limited inroad on the jury's traditional sphere. Fed.R.Civ.P. 53(b). Nevertheless, the use of a master is constitutional, and certainly is preferable to a denial of the Seventh Amendment right altogether.[61]

The Federal Rules of Evidence also provide for the simplification of the evidence presented at trial by allowing for the use of summaries of voluminous materials. Fed.R.Evid. 1006.[62] Since this rule should be construed so as to promote fairness, and eliminate unjustifiable expense and delay, it should be liberally employed in complex cases. *See* Fed.R.Evid. 102.[63] Whether the present case is tried to a judge or a jury, in view of the estimates of the amount of documentary evidence the fact-finder will have to read,[64] there will need to be extensive reliance upon summaries.[65]

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[61]*See In re Peterson*, 253 U.S. 300, 309-311, 40 S.Ct. 543, 64 L.Ed. 919 (1920); *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 868 (9th Cir. 1976), *cert. denied*, 429 U.S. 896, 97 S.Ct. 259, 50 L.Ed.2d 180.

[62]Rule 1006 provides as follows:

> "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

[63]Rule 102 provides as follows:

> "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

[64]The district judge assumed that there would be 100,000 pages of documentary evidence presented. 75 F.R.D. at 707.

[65]In the context of a criminal trial, Justice Frankfurter held for the Court that the use of summaries did not impair the jury's function, noting that "[n]o issue was withdrawn from the jury." *United States v. Johnson*, 319 U.S. 503, 519, 63 S.Ct. 1233, 1241, 87 L.Ed. 1546 (1943).

We generally accept the district court's characterization of the complicated nature of this case. It found that the fact-finder will, in part, need to focus on the following matters:

> "a) Complex real estate transactions. There were many intricate purchases and sales of large parcels of real estate. Large construction projects were undertaken. The financing of the purchases and of the construction projects often involved a series of loans among various USF subsidiaries. Sometimes there would be a series of purchases and sales with each subsidiary involved in the deal reporting a profit on its share of the transaction.
>
> "b) Reporting of income. Income reported was not always represented by cash in the bank. Income and profits from a variety of sources and in a variety of forms were reported. Sometimes the income was to be realized at a future date.
>
> "c) Securities. USF bought and sold securities of some of its subsidiaries. The value of those securities, and the net worth of those subsidiaries, hence would be of importance. These figures, in turn, would be affected by some of the other matters listed above."

75 F.R.D. at 712. We recognize that a difficult task lies ahead for the fact-finder in attempting to understand and unravel the USF financial records. Nevertheless, we believe that the use of the aforementioned considerations should reduce what might otherwise be considered the overwhelming complexity of the present case.

B. Abilities of Juries

The jury system has never been without its critics, which have included some of his country's most emi-

nent judges.[66] The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not

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[66]The late Judge Jerome Frank of the Second Circuit was the most outspoken critic of the jury system in this century. In his book, *Courts on Trial*, he noted that he was not the only skeptic:

> "My attitude towards the jury is not unique. James Bradley Thayer, a great legal scholar and a profound student of jury trials, said in 1898 that, in civil cases, 'I would restrict [jury trial] narrowly, for it appears to me . . . to be a potent cause of demoralization to the bar.' Learned Hand remarked in 1921, 'I am by no means enamored of jury trials, at least in civil cases. . . .' Mr. Justice Cardozo, in a Supreme Court opinion wrote, 'Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without' jury trials. The noted historian, Carl Becker, one of the ablest students of American history and institutions, said in 1945: 'Trial by jury, as a method of determining facts, is antiquated . . . and inherently absurd—so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him.' Two very able and experienced trial judges, Judge Galston and Judge Shientag, have each recently indicated a belief that the use of the jury in civil suits should be severely restricted. Judge Shientag said: 'The civil jury would seem to be unnecessary except in a few types of injury to the person, such as libel and slander, false arrest, and malicious prosecution.'"

Frank, Courts on Trial 124 (1949).

In a speech delivered this past summer to the Conference of State Chief Justices, Chief Justice Burger discussed the hardship created by asking lay jurors to sit for long periods of time in cases involving complicated legal and factual issues. He called upon the legal profession to begin an examination of alternatives to the use of juries in complex civil cases. *See* reports of the Chief Justice's speech at: 48 U.S.L.W. 2118-2119 (Aug. 14, 1979); The National Law Journal, Aug. 13, 1979, p. 21. We view these remarks as suggestions designed to initiate further study into the use of juries. not as comment upon the constitutional question addressed in the present case.

accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in other areas of public service.

Although various views have been expressed about the practical abilities of jurors, there has been little substantive research done on the subject.[67] This is due, in part, to the sacrosanct manner by which our country has regarded the jury's deliberative process. In the federal courts we generally do not allow any inquiry or challenge based on what occurs in the jury room.[68] In fact, the only major study undertaken

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[67]*See* Note, 92 Harv. L. Rev. 898, 918 (1979).

[68]The federal courts have traditionally protected the jury's deliberative process by preventing challenges to the verdict based on any arguments, statements, discussions, emotional reactions, votes, or methods used, in reaching a verdict. *See* Fed. R. Evid. 606(b) and the accompanying Advisory Committee Note. The Supreme Court has explained that if the rule were otherwise, then ". . . the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference." *McDonald v. Pless*, 238 U.S. 264, 267-268, 35 S.Ct. 783, 784, 59 L.Ed. 1300 (1915). Additionally, almost every verdict would be susceptible of some challenge, forcing judges to become ". . . Penelopes, forever engaged in unraveling the webs they wove." *Jorgensen v. York Ice Machinery Corporation*, 160 F.2d 432, 435 (2d Cir. 1947), *cert. denied*, 332 U.S. 764, 68 S.Ct. 69, 92 L.Ed. 349.

The origin of this rule, as are many other common law rules, is traced to Lord Mansfield. In *Vaise v. Delaval*, 99 Eng.Rep. 944 (K.B. 1785), he refused to consider affidavits showing that a jury had reached a verdict by lot. This basic rule preventing subjective challenges to the verdict of a jury survives today and is embodied in Fed. R. Evid. 606 (b):

> "(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connec-

(This footnote is continued on next page)

in this area, which violated the sanctity of the jury room, resulted in a public censure by the Attorney General of the United States and a Congressional investigation.[69]

Opponents of the use of juries in civil cases look to the virtual abolition of the civil jury in Great Britain as support for why a similar course should be followed in this country. However, an examination of the British experience does not support the conclusion that the gradual obsolescence of the civil jury there resulted from any consideration of the practical abilities and limitations of juries. In fact, the two principal causes of the civil jury's decline were a manpower shortage during World War I and an economy drive during the depression.[70] Neither consideration carries any weight in this country; we do not have a manpower shortage and the cost of juries is minimal at best.[71] And the most important factor which makes the British analogy inappropriate is that the civil jury was never afforded the constitutional protection in Great Britain that it has received in this country.[72]

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tion therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

[69]Kalven and Zeisel, The American Jury vi-vii (1965).

[70]Devlin, Trial by Jury 131 (1956); and *see* Higginbotham, *supra,* n. 56 at 51-52.

[71]As one commentator observed a few years ago, the amount which is spent annually on federal juries could buy two jet fighters, providing "they weren't too sophisticated." Janata, *Federal Civil Jury Trials Should Not Be Abolished,* 60 ABA Law J. 934 (1974).

[72]Higginbotham, *supra* n.56, at 52-53.

As we noted earlier (*see* n.17, *supra*), the outcome in *ILC Peripherals v. International Business Machines,* 458 F.Supp. 423 (N.D.Cal.1978), is based as an example of a jury's inability to serve as a fact-finder in complex cases. After discharging the deadlocked jury, the district judge asked the foreman whether a case like *ILC Peripherals* should be heard by a jury, to which the foreman responded as follows:

> "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that."

458 F.Supp. at 447. Although we can sympathize with the frustration that this juror must have felt after being deadlocked for nineteen days, it does not necessarily follow that the parties would be any better off trying the case to a judge rather than a jury. Although judges are lawyers, they generally do not have any more training or understanding of computer technology or economics than the average juror. Whether a case involves computer technology, aircraft design, or accounting, attorneys must still educate the uninitiated about the matters presented in their case. While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise of appellees' argument, "that a single judge is brighter than the jurors collectively functioning together."[73]

In fact, the vast majority of the parties to this appeal oppose the decision to strike the demand for

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[73]*Id.* at 53.

jury trial. We are impressed with this vote of confidence in the jury system shown by the litigants (both plaintiffs and defendants) and their experienced counsel. This serves as additional support for this court's belief that the present case is not beyond the practical abilities of a jury. In fact, experience demonstrates that juries are capable of sorting out complex factual issues and applying the law to them.[74]

IV. *CONCLUSION*

Not only do we refuse to read a complexity exception into the Seventh Amendment, but we also express grave reservations about whether a meaningful test could be developed were we to find such an exception. Where would the courts draw the line between those cases which are, and those which are not, too complex for a jury? The court below found that the complexity of the present case was created primarily by the accounting and financial nature of the issues and evidence. The appellees generally assume that only antitrust and securities cases could qualify for the complexity exception. We acknowledge the complicated nature of the evidence and issues associated with the accounting and financial questions involved in antitrust and securities cases. Yet, almost all tax cases also involve the same type of evidence and issues; does this then mean that there should not be a right to jury trial in this broad class of cases as well?

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[74]The American Jury System 19 (1977), Final Report of the (1977) Annual Chief Justice Earl Warren Conference on Advocacy in the United States (The Roscoe Pound-American Trial Lawyers Foundation).

Many other types of cases also require a jury to unravel complicated factual issues totally unrelated to financial or accounting problems. Products liability cases almost always require an inquiry into the design of the product, which includes the plan, structure, choice of materials, and specifications which were used. For instance, cases arising from airplane crashes often present difficult issues, the resolution of which is dependent upon engineering evidence relating to the design, metallurgy, materials, and service. Inevitably, both sides will present expert testimony on the different issues. Will this type of case also come within the complexity exception? Should we draw a distinction based upon whether a case involves engineering or accounting issues? Once we open the door, it would be difficult to keep it only partially open. In answering the Seventh Amendment question, we believe that any test which is dependent upon the complexity characterization of a case would be too speculative to be susceptible of any type of practical application.

Another argument which weighs heavily against the need for a complexity exception to the Seventh Amendment is provided by the procedural checks which a judge may exercise after a jury has returned a verdict. A new trial may be granted under Fed.R.Civ.P. 59 when the verdict is against the weight of evidence, the damages are excessive, or the trial was unfair for some reason.[75] And, a judgment notwithstanding

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[75]*Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

the verdict under Fed.R.Civ.P. 50 may be granted if there was not enough evidence to make an issue for the jury.[76] These procedures protect litigants from the risk of a jury reaching an "irrational" verdict.[77]

Although we express great confidence in the jury system, some of the points raised by its critics should not be summarily dismissed. However, in view of the mandate of the Seventh Amendment, time might be better spent in searching for ways to improve rather than erode the jury system.

We hold that there is no complexity exception to the Seventh Amendment right to jury trial in civil cases. We do not believe that the equitable action for an accounting can be stretched so as to include all the complex commercial cases which arise today. Moreover, we decline the invitation to read the *Ross* footnote as establishing a new interpretation of the Seventh Amendment. And we do not believe any case is so overwhelmingly complex that it is beyond the abilities of a jury. The order striking the demands for jury trial is REVERSED and this case is REMANDED for trial.

REVERSED.

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[76]For example, "when the evidence permits only one reasonable conclusion as to the verdict." *Fountila v. Carter*, 571 F.2d 487, 489-490 (9th Cir. 1978).

[77]*See Curtis v. Loether*, 415 U.S. 189, 198, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Jones v. Orenstein*, 73 F.R.D. 604, 606 (S.D.N.Y.1977).

FILED Dec. 10, 1979.

IN RE: U.S. FINANCIAL SECURITIES LITIGATION, NOS. 77-2993/2994/2995/3063/3064/3093/3099/3121/3122/3333/3344/3345.

KILKENNY, Circuit Judge, dissenting:

Although Judge Anderson presents mighty forceful arguments in favor of his respective theories, I remain convinced that the highly complicated issues presented by this litigation are such that an attempt to dispose of them in a jury trial would result in nothing short of judicial chaos.

It is my considered judgment that Judge Turrentine's opinion "covers the waterfront" and adequately responds to every proposal of the majority. *In re U. S. Financial Securities Litigation*, 75 F.R.D. 702 (1977). To express the same views in my own language would add nothing to the persuasiveness of the district court's opinion.

The fact that a number of the cases may have been settled since the consolidation and the order of the court striking the demands for a jury trial is of no consequence. If judicial power to proceed was present at the time of striking the jury trial demands, it would not be lost by reason of the settlement of claims subsequent to that time.

Memorandum Opinion and Order.

FILED June 24, 1977.

United States District Court, Southern District of California.

In Re U. S. FINANCIAL SECURITIES LITIGATION, M.D.L. Docket No. 161 (All cases)

TURRENTINE, District Judge.

The court's proposal to strike all demands for jury trial in the U. S. Financial cases was heard on May 31, 1977. The court, taking into account the issues raised in the written memoranda submitted by the various parties, and considering the matters presented during oral argument, hereby orders all demands for jury trial in the U. S. Financial cases stricken, and directs that the cases be consolidated for trial before the court sitting without a jury.

In essence, the court has made this order because these cases are too complex to be tried before a jury. In the following discussion, the nature of the U. S. Financial cases will first be outlined; next, the scope of the litigation and the task facing the finder of fact will be considered; and finally the state of the law will be examined to determine whether the court has the power to issue this order striking the demands for jury trial.

Nature of the Cases

Before the year 1969, U. S. Financial (hereafter, "USF") was primarily engaged in the construction and development of single family residences throughout the United States. In subsequent years, however, USF reported that its income was derived primarily from the sale of income producing properties and from real estate financing.

USF was a big business. It was involved in large real estate developments from coast to coast. It was engaged in all aspects of the real estate development business, including construction, design, and sale of many kinds of structures; the manufacture of modular and mobile homes; the financing, through subsidiaries, of various real estate projects; and, through other subsidiaries, the issuance of policies of title insurance as an agent. Its stock and debentures were registered with the SEC and traded on the New York Stock Exchange. Its issuance of 5½% debentures alone was in the amount of $35 million. It had some 4.5 million shares of common stock issued and outstanding.

Unfortunately, USF collapsed. The SEC suspended trading in USF securities on December 5, 1972, and in 1973 USF filed for protection under Chapter XI of the Bankruptcy Act. The bankruptcy proceeding was later converted to a Chapter X action.

Ten lawsuits relating to the collapse of USF were filed here and in four other judicial districts. On June 6, 1974, the Judicial Panel for Multidistrict Litigation ordered all of these cases transferred to this district for coordinated or consolidated pretrial proceedings, *In Re U. S. Financial Securities Litigation*, 375 F.Supp. 1403 (Jud.Pan.Mult.Lit.1974). Since the entry of that order, the *Great Commonwealth* case has been dismissed and eight additional lawsuits have been filed. Also a complaint by the SEC is before the court. The total number of USF cases (including the SEC case) is thus 18. A list of those 18 cases and the parties to each appears in Appendix A hereto.

To date, five classes have been certified in these cases. In the *Penn Mart* case, the class is composed of all purchasers of USF common stock between 1970

and 1972 who either held the stock on December 5, 1972, or who sold the stock and were damaged by the wrongs complained of in the complaint. In the *Fabrikant* cases, the class consists of all those who purchased USF 5½% convertible subordinated debentures between April 1, 1971, and December 5, 1972. Both certifications were ordered on September 11, 1974. *In Re U. S. Financial Securities Litigation,* 64 F.R.D. 443 (S.D.Cal.1974). The defendants appealed, but the class designations were sustained. Nos. 74-4535, 3436, and 3437, and 75-1496, 9th Cir., May 19 and July 9, 1975.

A class consisting of the holders of the USF 9% bearer debentures between April 8, 1970, and July 23, 1973, was designated in the *Societe* cases. *In Re U. S. Financial Securities Litigation,* 69 F.R.D. 24 (S.D.Cal.1975). Again, the class designations were sustained on appeal. No. 75-8344, 9th Cir., September 22 and November 3, 1975.

The issues raised in the 18 cases are primarily federal securities law violations, California securities law violations, and common law fraud. Violations of Ohio securities laws, and certain other common law claims, are also asserted. In addition to substantive claims, the complaints include allegations of vicarious liability such as conspiracy, aiding and abetting, and the controlling person doctrine.

More specifically, the 20 or so individual defendants and the 80-odd corporate or partnership defendants are accused of eleven different violations of Section

10(b), five violations of Section 13(a), and violations of other sections of the Securities Exchange Act of 1934. The defendants are also said to have violated Sections 11, 12(2) and 17 of the Securities Act of 1933. In addition, common law counts based on negligence, gross negligence, and malpractice are found in many of the complaints.

The subject matter of the litigation includes many different offerings of USF securities. For example, some of the complaints allege that the $35 million issuance of the 5½% debentures was fraudulent. Fraud is also alleged in connection with the overseas offering of the 9% debentures, the sale of 3¾% series A preferred stock and the sale of the series D convertible preferred stock. Promissory notes totaling nearly $700,000.00 are involved in some of the cases.

Each case is complicated by varying relationships between the stock offering and the party asserting the claim. For example, the *Mellon Bank* cases pertain only to those parties who held common stock or 5½% debentures. Those plaintiffs holding the debentures accuse some of the defendants in this case of violating sections 10(b) and 13(a); those plaintiffs who hold common stock exclude one defendant and assert a different count of negligence against the others. Thus, some of these cases have within them various sub-groups of plaintiffs asserting liability against various sub-groups of defendants, the cause of action asserted against each sub-group depending on the particular type of security involved.

Furthermore, the number of parties asserting claims against the defendants is not limited to the plaintiffs and the five certified classes. Many of the defendants have filed cross-claims against one another. Appendix B provides a rough summary of the cross-claims among the various defendants named in the earlier complaints.

Scope of the Litigation

The preceding outline will serve to give a general understanding of the types of claims involved in these cases and the number of parties appearing either as plaintiffs or as defendants. However, the actual extent of any lawsuit depends less on the number of parties or cases than on the complexity of the factual matters presented for resolution. Accordingly, those matters will now be examined.

In the cases comprising the USF litigation in this court, the complaints allege, among other things, many kinds of inaccuracies in financial statements issued by USF. A large number of these inaccuracies relate to transactions between USF and its numerous subsidiaries. Income reported by USF is said to be grossly inflated. It is alleged that improper accounting standards were used. Reported income is alleged never to have been received. Irregularities in the way certain subsidiaries financed the projects undertaken by other subsidiaries are involved, as are the accounting standards used to report—or not report—such financing and the resulting contingent liabilities.

During the past three years, the various parties have been industriously deposing each other and the numerous witnesses involved in these cases. The transcripts of these depositions fill some 150,000 pages. It does not take much imagination to figure how many months

of court time would be necessary just to read even a significant fraction of that amount of testimony out loud in the court room. In an actual trial, of course, many of the witnesses who were deposed would testify in person. It is safe to assume that such testimony would take even longer than it would take to read the deposition of that witness aloud.

It appears that upwards of five million documents have been made available for discovery at the various document depositories which the parties have created. It is certain that a significant fraction of those documents will be introduced into evidence during the trial by one or another of the various parties. The Plaintiffs' Steering Committee alone has identified nearly 12,000 documents which it presently plans to offer. Even if it be assumed that all of the defendants combined will offer no more than a like number, the court will be asked to receive a total of 24,000 documents. Not only that, but many of these documents are multi-paged items such as minutes of meetings, reports, etc. Assuming an average of only four pages per document, there will be a total of 100,000 pages of documentary evidence presented to the court.

The magnitude of the task facing the fact finder will now be considered against the preceding background.

The Fact Finder

The time and effort necessary to read and understand 100,000 pages comes a little into focus when one realizes that such a quantity of paper forms a stack over forty feet high (as high as a three-story building). In the alternative, one could say that such a quantity of paper would completely fill five large

filing cabinets. Or, from a lawyer's perspective, reading those 100,000 pieces of paper would be like sitting down to read the first 90 volumes of the Federal Reporter, 2nd Series—including all the headnotes.

The fact finder will not only have to read, but will have to comprehend, the contents of these thousands of documents. It will have to analyze the USF accounts and the accounts of many subsidiaries, not only as they exist, but as the plaintiffs contend they should have existed. It will have to listen to, understand, and remember—throughout the trial—months upon months of highly technical and often boring testimony about various aspects of the USF accounts, including the testimony of the various expert witnesses who inevitably will be called by many of the parties to give their theories of whether the accounting standards actually used were correct, and, if not, what the correct standards should have been. After receiving and evaluating all of the evidence, the fact finder will then have to apply this mass of information to all of the asserted causes of action, each of which is based on different laws and different standards. The finder of fact must consider, separately, the evidence pertaining to each of the 100 or so defendants so as to reach a correct decision as to each. Finally, the fact finder will have to figure out which of the 100 or so defendants are liable to which of the plaintiffs, and which of those defendants are consequently liable to which of the other defendants who cross-complained, and for how much money.

The magnitude of the task for the fact finder is partially outlined by the pretrial memorandum of the Steering Committee of Plaintiffs' Counsel, recently received by the court. This document is 806 pages long,

not counting the 18-page table of contents (it measures 95 centimeters in thickness). A separate 26-page witness list tells the reader that the plaintiffs intend to call, in person or by deposition or in some cases by both, a total of 241 witnesses. The plaintiffs' list of documents to be offered into evidence is about the same length and size as the pretrial brief itself; it lists 11,729 documents. Thus, it has taken the plaintiffs more than *800* typewritten pages just to describe in outline form the issues which they plan to litigate; in order to carry out their plan of litigation, the plaintiffs will need to call nearly 250 witnesses and offer nearly 12,000 documents into evidence.

The magnitude of the task may also be defined by way of comparison to the state cases. There is a related set of USF cases involving the same subject matter and many of the same parties, although on a much smaller scale, now in trial in the Superior Court of the State of California, in and for the County of San Diego. The trial began on March 28, 1977. As of June 22, 1977, nearly three months later, twenty out of the 55 witnesses to be called by the plaintiffs have testified. Thirteen of the 24 plaintiffs have testified. Needless to say, the defendants have not yet begun to produce their witnesses. At its present rate, the trial will continue until early November, 1977, just to complete the plaintiffs' case. Obviously the original estimate of a trial time of three to five months now appears to be totally inadequate. Although there were four alternate jurors, it has already become necessary to excuse two of them.

In view of the enormous job facing the fact finder in the trial of these cases, the court has questioned whether a jury—any jury—is equal to the task. Accord-

ingly, the question of whether the law permits a choice or whether it compels a jury trial, given that a timely demand therefor has been made, will be discussed next.

The Seventh Amendment and its Limits

Our law has always strongly favored trial by jury in most kinds of cases. The Seventh Amendment guarantees the right to trial by jury "in suits at common law, where the value in controversy shall exceed twenty dollars." Mr. Justice Story explained and gave substance to the meaning of the Seventh Amendment in *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 447, 7 L.Ed. 732 (1830), where he wrote:

> In a just sense, the [Seventh Amendment] then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

The question is whether the USF cases come within the purview of the Seventh Amendment so as to guarantee the parties to these cases the jury trial which many of them have demanded. According to the *Parsons* case, the answer is in the affirmative unless equity jurisdiction is available.

The classification of the USF cases as "legal" or as "equitable" is a difficult task. A brief glimpse at the law of England will be helpful as a starting point, because the whole concept of trial by jury comes to us from our English legal heritage.

In modern English practice, the jury in civil trials has all but disappeared by virtue of Parliamentary decree. However, long before the statutory curtailment of the civil jury, the English courts were denying jury trials in cases which were too complex to be tried

to juries; the English judges evidently were of the opinion that in complex cases only a judge could render a fair decision. Such cases, accordingly, were tried in equity rather than at law. For example, in *Wedderburn v. Pickering,* 13 Ch.D. 769 (1879), Jessel, M. R., quotes with approval the restatement of the "old" rule found in *Clarke v. Cookson,* 2 Ch.D. 746 (1875), to the effect that some cases are "from great complexity, or otherwise, not capable of being conveniently tried before a jury." And in *Clench v. Tomley,* Cary 23, 21 Eng. Rep. 13 (1603), a case which turned primarily upon the interpretation of 60-year-old documents, Lord Egerton denied a jury trial because the dispute was

> to be discerned by books and deeds, of which the Court was better able to judge then [sic] a jury of ploughmen, notwithstanding that exceptions were alleged against those ancient writings;
>
> . . .

Thus, since long before the American Revolution, the common law recognized that the sheer complexity of a case, in particular a case which involved many complicated documents, was sufficient grounds to deny a jury trial; this concept is now expressed in the statutes of England.

As early as 1805, the same rule was applied in the United States in the case of *Ludlow v. Simond,* 2 Caines Cases 1, 2 N.Y. Common Law Rep. 747, 760-761 (1805). More recently, in *Bennett v. United Lumber and Supply Co.,* 110 Conn. 536, 148 A. 369 (1930), the court said (110 Conn. at 537-538, 148 A. at 369):

> [This is] an action for an accounting involving many charges and credits between the parties ag-

gregating upward of $50,000.00. The trial was a protracted one; the account a difficult one to unravel. The printed evidence consists of 366 pages of the record, while there were introduced in evidence 64 exhibits. No action for an accounting, or one of this character, should be tried to the jury. It imposes upon a jury an impossible task, to expect them to carry in memory the details of a case of this character. It is unfair to a litigant to have his case determined by a tribunal which cannot fulfill that duty with accuracy or justice, however intelligent and desirous of doing their full duty the tribunal may be.

See, also, The Pound Conference, 70 F.R.D. 79, "Complex Civil Litigation—Have Good Intentions Gone Awry?", Francis R. Kirkham, 70 F.R.D. 199, 209, recognizing the Court's "traditional equity power, *unaffected by the Seventh Amendment,* to dispense, in their discretion, with juries in complex cases." (Emphasis added)

The Supreme Court has expressly recognized the equitable power of the courts to try complex cases in equity and dispense with a jury. In *Kirby v. Lake Shore & Michigan Southern Ry,* 120 U.S. 130, 134, 7 S.Ct. 430, 432, 30 L.Ed. 569 (1887), the court said:

> The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion . . . I Story Eq.Juris. § 451. Justice

> could not be done except by employing the methods of investigation peculiar to courts of equity.

In *United States v. Bitter Root Development Co.,* 200 U.S. 451, 26 S.Ct. 318, 50 L.Ed. 550 (1906), the Supreme Court rejected the plaintiff's attempt to bring an action at law on the equity side of the court because the lawsuit involved was really no more than an action in trespass. The Court again recognized, however, that the complexity of a case was a factor which would warrant the assumption of equitable jurisdiction. In referring to *Kendall, Administratrix of Green v. Creighton,* 64 U.S. (23 How.) 90, 16 L.Ed. 419 (1860), a case in which equity jurisdiction was approved, the first item listed by the Court which warranted equity jurisdiction in the *Kendall* case was: "the facts were complicated." (200 U.S. at 475, 26 S.Ct. 318)..

In *Bitter Root,* the Court also held that difficulty of proof was not enough to confer equity jurisdiction. This rule was approved in *Curriden v. Middleton,* 232 U.S. 633, 636, 34 S.Ct. 458, 459, 58 L.Ed. 765 (1914). Although it was urged that the facts in *Curriden* were complicated, the Court disagreed and said "and further, mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction." Accordingly, it takes something more than the "mere" complication of facts to confer equity jurisdiction. It remains to determine what that "something" is and to decide whether it is present in the USF cases.

Complexity and Equity Jurisdiction

In recent years, the Supreme Court has on several occasions addressed the extent of the right to trial by jury. In *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510-511, 79 S.Ct. 948, 957, 3 L.Ed.2d 988

(1959), the Court held that in a case presenting *both* legal *and* concededly equitable issues,

> only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

The Court did not address the problem of how to decide whether a case has become so complex as to create equitable jurisdiction; it dealt with issues the legal or equitable nature of which was not in dispute.

In *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 478, 82 S.Ct. 894, 900, 8 L.Ed.2d 44 (1962), the original plaintiff had filed a lawsuit in which an "accounting" was demanded. The Court found that in fact the complaint was really nothing more than an action on a contract, or in the alternative a trademark infringement case, and had this to say about equitable jurisdiction in complex cases (relying in part on *Kirby, supra*):

> The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres,* the absence of an adequate remedy at law. Consequently, in order to maintain such a suit [in equity] on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.

The basis for granting equity jurisdiction over cases of extraordinary complexity is, of course, the inadequacy of the legal remedy, or more specifically, the inability of the jury to handle the case and render

a fair decision, as the Court noted in *Dairy Queen.* Recently the Court had occasion to formulate a test which is to be used in deciding whether a case is legal or equitable in nature. One part of the test is whether a jury is capable of rendering such a decision; if it is not, then the case should be tried in equity by the court without a jury. The test is found in *Ross v. Bernhard,* 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), at page 538, n. 10, 90 S.Ct. at page 738:

> the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.

The problem of when a case becomes so complex as to be beyond the abilities of a jury to decide was carefully considered by the District Court in *Goffe & Clarkener, Inc. v. Lyons Milling Co.,* 26 F.2d 801 (D.Kan.1928), *aff'd,* 46 F.2d 241 (10th Cir. 1931). The court there, after a careful review of the existing authorities including *Kirby,* concluded that (page 804)

> while mere difficulty of proof is not sufficient to confer jurisdiction upon equity, yet if the action is one for an accounting, and the account presented is so difficult, complicated and confusing that a jury cannot handle it, an action may properly be brought in equity for the purpose of taking the accounting. But the field is a narrow one.

In *Tights, Inc. v. Stanley,* 441 F.2d 336 (4th Cir. 1971), the court, relying on *Bitter Root,* distinguished complicated issues of *liability* from complicated issues of *damages.* However, the *Tights* court recognized that

in some cases the complex issues might arise during the liability part of the trial, and said that in its opinion the Supreme Court would have to decide whether such complex cases could be tried in equity rather than by a jury.

In *Ochoa v. American Oil Co.*, 338 F.Supp. 914, 921 (S.D.Tex.1972), the court, without limiting its reasoning to the damages part of a trial, said

> In an extraordinary case, the complexity of issues may be so great that only a court of equity may unravel them, thus implying an inadequate remedy at law. It is easier to state this principle than to hypothesize a case in which it would apply.

The court there questioned the propriety of inquiring into the abilities of juries, but conceded that such inquiries are occasionally made by the courts. In view of the holding in *Ross*, however, this court does not believe it inappropriate to make such an inquiry.

Finally, at least one court has decided that a modern case is so complex as to warrant striking timely demands for jury trial. The case is *In Re Boise Cascade Securities Litigation*, 420 F.Supp. 99 (W.D.Wash.1976). There are many similarities between the *Boise* cases and the USF cases, although a review of the facts in *Boise* will show that the USF cases in many respects are even more complex than the *Boise* cases. The essential similarity between the two cases, however, is the presence of complicated accounting problems. The *Boise* court described these problems as follows (420 F.Supp. at page 103):

> Finally, and most important, in order to determine whether liability exists, the fact finder will have to analyze the Boise accounting, not only

> of the accounts as they existed at the time of the merger, but as the plaintiffs claim they should have existed. It is anticipated that experts for each side will have to go through the accounting techniques and resulting figures in each of the areas complained of in [the complaint]. In all, *assets and liabilities in excess of a billion dollars are involved and a period of more than five years will have to be examined.* (Emphasis in original)
>
> . . . .
>
> Competing theories of accounting will be presented for all of these matters. It has been suggested that more than one "generally accepted accounting principle" can be applied to a particular bookkeeping problem but that not all of those principles fairly reflect the financial condition of the corporation.
>
> In sum, it appears to this Court that the scope of the problems presented by this case is immense. The factual issues, the complexity of the evidence that will be required to explore those issues, and the time required to do so leads to the conclusion that a jury would not be a rational and capable fact finder.

From the above cases, some general guidelines can be established for deciding whether a particular case is so complex that equity jurisdiction will attach and permit the case to be tried without a jury.

First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury resolution. Although such problems often arise only during the damages portion of a trial, they sometimes are present during the liability portion as well. Also, given the comments in *Dairy Queen* regard-

ing special masters, only a case in which such a special master could not assist the jury meaningfully may be subject to removal from the province of the jury because of complex accounts.

Second, the jury members must be capable of understanding and of dealing rationally with the issues of the case.

And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for the jurors to function effectively throughout the trial.

Problems with Accounts

In applying the first of these guidelines to the USF cases, some general comments about accounting and equity are in order. In essence, a typical accounting case appearing before the equity courts of old would have involved the records of transctions by an agent or fiduciary on behalf of his principal. Another such case might have included a demand by one partner in a partnership for an explanation of the way the other partner accounted for the firm's financial affairs. The primary task—in some cases, the only task—to be performed by the court in these cases was to reconcile the accounts and determine from them how much money was due from the one party to the other. Sometimes, of course, the *existence* as well as the *amount* of a liability would depend on the accounting. But in all of these cases, the common sense; the community standards; and even the knowledge of the facts, in the earliest cases; which the jury brought into the courtroom and with which the evidence was to be evaluated were of little or no use in performing what was essentially a bookkeeping operation.

Indeed, not only did the jury not have anything positive to contribute to the decision of such cases, but in fact the jurors were often incapable of understanding what the cases were all about. For example, in *Clench v. Tomley, supra,* which did not even involve accounts but which *did* require an ability to read the printed word, the court quite understandably was unwilling to permit a jury of "ploughmen"—that is, a jury of illiterates—to make the fact finding decisions.

It would seem obvious, if two parties have a dispute the resolution of which hinges on the meaning of a document, that they would not expect someone who cannot read to be capable of achieving an intelligent and fair resolution of the dispute. Likewise, it would seem obvious, if two parties have a dispute the resolution of which hinges on the accounts between the parties, that they would not expect an intelligent and fair resolution of the dispute from someone who does not understand accounting. They would want someone who understands accounts, and who will patiently take the time to go through their records so as to put the accounts in order, to render the decision. Thus, in the days when jury members could not read, it was no more than common sense for the common law to recognize that its juries could not provide an adequate remedy to those litigants whose disputes primarily involved documents. In the days when jury members could not understand arithmetic, it was no more than common sense for the common law to acknowledge that its juries could not provide an adequate remedy to those litigants whose disputes primarily involved accounts—even comparatively simple accounts. And in more modern times it is no more than common sense for the law to recognize that modern juries are

not capable of providing an adequate remedy to those litigants whose disputes involve accounting of complicated commercial transactions (*e. g., Kirby, supra*).

A study of the allegations of the parties to the USF cases shows that accounting problems of the most intricate kind lie at the very heart of the cases. A review of the pleadings alone gives an idea of the scope of these problems, and the pre-trial brief submitted by the plaintiffs brings them more into focus.

The trier of fact will first have to familiarize itself with the USF accounts as they presently exist. These accounts, which go back a number of years, include, *inter alia:*

a) Complex real estate transactions. There were many intricate purchases and sales of large parcels of real estate. Large construction projects were undertaken. The financing of the purchases and of the construction projects often involved a series of loans among various USF subsidiaries. Sometimes there would be a series of purchases and sales with each subsidiary involved in the deal reporting a profit on its share of the transaction.

b) Reporting of income. Income reported was not always represented by cash in the bank. Income and profits from a variety of sources and in a variety of forms were reported. Sometimes the income was to be realized at a future date.

c) Securities. USF bought and sold securities of some of its subsidiaries. The value of those securities, and the net worth of those subsidiaries, hence would be of importance. These figures, in turn, would be affected by some of the other matters listed above.

Merely to understand the USF accounts—covering, as they do, such an extended period of years and

including all aspects of such a large business—will be a sizable undertaking. But the trier of fact will not only have to understand the accounts, but will have to decide whether they accurately reflect the financial condition of USF and of its many subsidiaries at various points in time. As the *Boise* court noted, conflicting accounting theories will be presented as to how these very involved accounts should have been reported. The trier of fact will have to decide whether "income" reported by a given subsidiary was correctly reported, whether it should have been reported partially as future income, and if so in what proportion to current income, whether that report of income affected the net worth of USF, if so how much, and so on for many intricate transactions.

The court believes that jury members are singularly unqualified to study, untangle, and make comprehensible the USF accounts because the accounts are so complicated and because there are so many uncertainties as to correct accounting standards, proper application of those standards, etc. Throughout the process of accounting which the fact-finder must complete are decisions and value judgments which must be made. It would not be feasible for a special master to list the figures and then have a jury apply those figures to the balance of the evidence. In the USF cases, the accounts are so central to the ultimate issues of the cases and so pervasive throughout all aspects of the cases, that the trier of fact must be someone who is capable of understanding and rationally reconciling the mass of data which will be presented during the trial.

The court thus concludes that the first guideline is satisfied. The accounting problems presented by the USF cases are so central to the ultimate issues in

the cases as to make unrealistic a plan for having one or more special masters perform the accounting for the jury. The accounts are of the type which historically have been adjudicated in equity because juries cannot properly deal with them. Since the first guideline suggests the propriety of court trial of the USF cases, an examination of the other guidelines will next be undertaken.

The Laws Applicable

As had already been noted, liability has been asserted against various defendants under numerous different Federal laws and under the laws of at least two states. The court has grave doubts of the ability of a jury to comprehend, and deal rationally with, a set of cases in which the number of plaintiffs here present are suing the number of defendants here present, under the variety of legal theories here advanced, and with the number of counterclaims here asserted. It should not be necessary to recite again the figures or to attempt to explain the numerous theories of recovery. The Appendices hereto will show how complex the interrelationships of the various parties are, and the complaints illustrate the variety of legal theories in existence. The court does not believe that a jury can rationally cope with a case of this complexity even aside from the incredibly difficult accounting problems already discussed. Accordingly, the second guideline is also satisfied.

The Third Guideline

It is not unlikely that the trial in the USF cases will last for two years or more, according to estimates of counsel. In view of the progress of the much simpler proceeding in state court, the estimate of two

years appears entirely reasonable. But can a jury be chosen that could sit for such a long trial?

One of the factors which *Ross v. Bernhard, supra,* listed as governing the right to jury trial is the "practical limitations" of jurors. Although the preceding discussion might well be thought to constitute a consideration of just such limitations, the length of a trial gives rise to a study of different kinds of limitations inherent in a jury trial.

First, of course, will be the difficulty in selecting a jury at all. Any experienced trial judge knows that there is an enormous difference between asking an average citizen to sit for a few days or even for a few weeks on a jury, on the one hand, and asking the same citizen to sit for two years on the other hand. It would be unconscionable to demand of any gainfully employed person—even a civil servant, who normally will be excused from his regular duties to participate as a juror—that he abandon his career for two years. Few employers would tolerate such a period of absence; few careers would not be materially and permanently retarded in terms of promotions, seniority, maintenance of professional proficiency, etc., by such a long absence. The housewife who does not have small children, while often entirely willing to sit for shorter cases, would likely be unwilling to leave her husband and family to the care of others for such a time. Even a retired person might well be unwilling to undertake what would amount to a permanent job during the years which he had planned to spend fishing or in other such pursuits. The court is firmly convinced that it would be intolerable for a two-year tour of duty to be imposed upon anyone who is unwilling to assume it; and the court does

not believe that very many can be found who will be willing to serve for two years.

Even assuming that an acceptable (to the parties) jury panel can be found, there are difficulties which are bound to arise during a two year period which simply do not cause problems in a shorter trial, even a trial of several months duration. For example, jurors of advanced age might die before the trial ended. A housewife might have to accompany her husband to a new job in a distant city. Jurors might have to attend family funerals, might become ill, might become pregnant, etc. The list could go on, but it should already be sufficient to make the point: enough unforeseen things are likely to happen during a two-year period as to make it very difficult to begin a jury trial with any realistic assurance that the jury will still exist two years in the future.

For these reasons the court believes that a two-year jury trial is, of itself, beyond the practical limitations of the human beings who would be asked to serve.

Conclusion

All of the guidelines distilled from the cited authorities suggest that the USF cases should not be tried to a jury. Accordingly, the court finds that the USF cases come within the equity powers of the court, and the court will proceed to try the cases without a jury.

It has been suggested that the cases be severed and returned to their respective districts for separate trials. However, if the 18 cases are tried separately, the cases would have to be staggered over a 12 to 18 year period because many critical parts of the proof in the various cases are the same and because the evi-

dence will come for the most part from the same witnesses. It would be grossly unfair to the plaintiffs, if they have been wronged, or to the defendants, if they have done no wrong, for such a period of time to elapse before these cases come to a close and appropriate remedies are effected. Therefore, to conserve judicial time and in fairness to the plaintiffs as well as to the defendants, these cases shall be tried as a consolidated case.

The court wishes to emphasize that it has not lightly made the decision to strike the jury demands in these cases. This court has had some ten years of experience as a trial court and during that time has presided at more than 300 jury trials, both criminal and civil. The court is a firm believer in the jury system and, time and again, has expressed its confidence in the abilities of juries to reach just decisions. It is precisely because of this experience, however, that the court realizes the limitations of juries and has reached the conclusion that a jury could not fairly try the USF cases.

Assuming that these cases proceed to court trial, many devices are available to assist the court in reaching a just resolution of the controversy. Special masters can be appointed to review and organize the documentary evidence, the depositions, and the testimony of the various witnesses. A schedule could be adopted providing three days per week of actual trial and a fourth day for conference between the judge and the special masters to review and study the evidence presented during that week. Daily transcripts can be prepared and used during the weekly review. Such methods as these are easy to use if the trial is to the court, but are well-nigh impossible to use in a jury trial.

The court is mindful of the point argued by some of the parties to the effect that the pre-trial briefs and the pre-trial proceedings now in progress may simplify these cases enough so that a jury could cope with them. If such a state of affairs comes about, the court will reconsider this order. However, in order to avoid delays close to the time of trial, it is imperative to proceed now to resolve the jury trial issue.

The court recognizes the possibility that an appellate court will take a different view of the issues raised in this order. It would be a tragedy to undertake the enormous expense and effort on the part of the parties and the court of conducting a trial of this case only to have an appellate court later invalidate the entire proceeding because a jury should have been used. Therefore, the court hereby certifies the question for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). The question is of overriding importance to the litigation. It is a controlling question as to which there is likely to be a substantial difference of opinion. Resolution of the question before trial will materially advance termination of the litigation because it will avoid the possibility of a re-trial because of this issue.

Merely the logistical problems presented by a jury trial of these cases—given the number of counsel and parties involved—are immense. The court is uncertain as to where to find a courtroom large enough to accommodate 18 to 30 attorneys for the plaintiffs and 50 and 55 attorneys for the defendants—not to mention the parties themselves and, last but not least, the jurors and the many alternate jurors that will of course have to be present.

Because it would be so unfair to undertake the trial of this case under the threat of appellate reversal,

the court will conclude that any party which does not proceed with interlocutory appeal at this time has waived its right to do so later and has withdrawn its demand for trial by jury.

To eliminate or minimize any possibility of delay resulting from this order, the court will retain jurisdiction of these cases (except for the jury trial issue) and the parties will proceed in accordance with the pretrial schedule now in existence.

Accordingly,

IT IS ORDERED that all demands for jury trial filed in the USF cases are hereby stricken.

IT IS FURTHER ORDERED that this order is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

IT IS FURTHER ORDERED that any party failing to avail itself of the opportunity for interlocutory appeal, or failing to timely seek mandamus as to this order, shall be deemed to have waived any objections it may have thereto and shall be deemed to have withdrawn it [*sic*] request for jury trial.

IT IS FURTHER ORDERED that in all other respects the court will retain jurisdiction of these cases and that the parties shall submit their pretrial briefs and in all other respects comply with the existing pretrial schedule.

Appendix A

List of Consolidated USF Cases

Case No: 73-312

Plaintiff: John Risque

Defendant: Robert Walter

Case No. 73-508

Plaintiff: William Foote

Defendants: R. H. Walter, W. W. Fox, D. C. Kok, P. Hampton, R. M. Overall, V. J. Schulman, T. W. Smith, W. N. Thayer, J. L. Weinberg, J. B. Halverson, R. G. Stewart, H. W. Crosby, C. N. Mosser, P. D. Reed, E. Singer, R. S. Walter, D. G. Leaverton, E. C. Hickson, E. T. Gravette, D. C. Cook, G. Coquillard, W. A. Stenson, C. Dietz, Morgan Wright, Touche Ross & Co., Richard C. Engleberg, Richard E. Herrinton, John J. Malkind, Ruth Chapin, Glen A. Olson, Union Bank, U. S. Financial, and Harold Turner.

Case No: 74-281

Plaintiff: Penn Mart Realty

Defendants: U. S. Financial, Touche Ross & Co., H. W. Crosby, W. W. Fox, P. Hampton, E. C. Hickson, J. B. Halverson, D. C. Kok, R. M. Overall, P. D. Reed, V. J. Schulman, E. Singer, T. W. Smith, R. G. Stewart, W. N. Thayer, R. S. Walter, R. H. Walter, J. L. Weinberg, D. G. Leaverton, A-H Properties, R. W. Arneson, D. Hill, Bay View Investments, W. P. Gribben, C. Prutzman, Coastal Land Corp., W. O'Bryon, Consolidated Equity Companies, J. L. Schram, D. G. Pratt, J. M. Taylor, R. G. and V. F. Asaro, R. G. King, P. Mitrovich, J. Ets-Hokin, National Community Builders and Union Bank.

Appendix A — Continued

Case No: 74-282 and 74-283

Plaintiffs: Michael Fabrikant and Milton Binswanger

Defendants: Touche Ross & Co., Goldman Sachs & Co, Argio Capital Corp, Arnhold & S. Bieichroeder Inc, Bache & Co, Basle Securities Corp, Bateman Eichler Hill Richards, Inc, Bear Stearns & Co, A. G. Becker & Co, Bender Co, Blyth & Co, Boettcher & Co, Blunt Ellis & Simmons, Inc, J. C. Bradford & Co, Burnham & Co, Butcher & Sherrerd, CBWL-Hayden Stone Inc, Cazenove Inc, Clark Dodge & Co, Crowell Weedon & Co, Dain Kalman & Quail Inc, Davis Skaggs & Co, Doft & Co, Dominick & Dominick, Inc, du Pont Glore Forgan Inc, First California Co, Eastman Dillon Union Securities & Co, Equitable Securities Morton & Co, Ferris & Co, The First Boston Corp, Gutzwiller Kurz Bergener Securities Limited, Hambrecht & Quist, Hornblower & Weeks-Hemphill Noyes, William Hutchinson & Co, E. F. Hutton & Co, Kidder, Peadbody & Co, Kleinwort Benson Inc, Kohlmeyer & Co, Lazard Freres & Co, Lehman Bros Inc, Loewi & Co, McDonald & Co, Merrill Lynch, Pierce, Fenner & Smith Inc, Mitchum, Jones & Templeton Inc, Model Roland & Co, New York Hanseatic Corp, John Nuveen & Co, The Ohio Company, Oppenheimer & Co, Paine, Webber, Jackson & Curtis Inc, Paribas Corp, H. O. Peet & Co, Pierson Heldring & Pierson, Piper Jaffray & Hopwood, Inc, R. W. Pressprich & Co, Rauscher Pierce Securities Corp, Reynolds & Co, Roberts Scott & Co, The Robinson-Humphrey Co, L. F. Rothschild & Co, Salomon Bros, Scherck Stein & Franc Inc, Shearson, Hammill & Co, Shields & Co, Shuman Agnew & Co, I. M. Simon & Co, Singer & Friedlander Limited, Singer Deane & Scribner, Smith Barney & Co, Societe Generale de Banque S.A., Stern Frank Meyer & Fox,

Appendix A — Continued

Inc, Stone & Youngberg, Strauss Turnbull & Co, Sutro & Co, Thomson & McKinnon Auchincloss Inc, Walston & Co Inc, Watling Lerchen & Co, Wertheim & Co, Dean Witter & Co, Wood Struthers & Winthrop Inc, R. H. Walter, J. B. Halverson, R. G. Stewart, D. C. Kok, H. W. Crosby, W. W. Fox, R. M. Overall, P. D. Reed, V. J. Schulman, E. Singer, T. W. Smith, W. N. Thayer; J. L. Weinberg, J. G. Wilson, E. C. Hickson, W. B. Moeser, T. H. Nielsen, R. S. Walter, D. G. Leaverton, J. Nakaji, C. H. Dietz, G. L. Fitzgerald, P. Hampton, R. B. Yerby, R. D. Smith, H. H. Litton, C. M. Mosser, R. G. Abbott, Union Bank, U. S. Financial, W. L. O'Bryon, W. P. Gribben, R. W. Arneson, D. Hill, A-H Properties, R. Grant, V. F. Asaro, G. A. Einhorn, R. B. Hunt, Whitcom Investment, and C. Prutzman.

Case No: 74-284, 74-285 and 74-354

Plaintiffs: Decatur Income Fund, Inc, Colonial Convertible Fund, Inc, Commerce Bank ot Kansas City, First National Bank in Dallas, North Carolina National Bank, Lutheran Brotherhood, American Automobile Association, Armed Forces Relief & Benefit Association, Memphis Light Gas and Water Division Retirement and Pension System, International Brotherhood of Painters and Allied Trades, AFL-CIO (Death Benefit Fund), International Brotherhood of Painters and Allied Trades (General Officers and General Representatives Retirement and Pension Fund), and Guaranty Trust Co.

Defendants: Same as for Case No. 74-282.

Case No: 74-286

Plaintiffs: First National Bank of Toledo, V. A. Mosser, C. N. Mosser, and Janet M. Sweeney.

Defendants: Touche Ross & Co, R. H. Walter, J. B. Halverson, R. G. Steward, R. G. Abbott, D. C.

Appendix A — Continued

Kok, R. N. Gould, W. B. Moeser, G. L. Fitzgerald, L. L. Gordon, B. H. Alden, B. G. Coggan, H. W. Crosby, J. Elman, M. Erskine, W. W. Fox, J. M. O'Hern, R. M. Overall, V. J. Schulman, J. G. Wilson, T. W. Smith, W. N. Thayer, J. L. Weinberg, E. C. Hickson, R. S. Walter, J. Nakaji, T. H. Nielsen, P. D. Reed, C. H. Deitz, E. Singer, Whitcom Investment Co, Goldman Sachs & Co, First California Co, Inc, Burnham Management Co, Union Bank, M. Altschuler, C. Prutzman, R. W. Arenson, D. P. Hill, W. P. Gribben, W. L. O'Bryon, A-H Properties, Bayview Investments, R. G. King and A. Adams.

Case No: 74-288

Plaintiffs: Mellon Bank and John S. Renkerk.

Defendants: Touche Ross & Co, U. S. Financial, Union Bank, Goldman Sachs & Co, Salomon Bros, Dean Witter & Co, Lehman Bros, Drexel Burnham & Co, Gant & Asaro, A-H Properties, R. H. Walter, J. B. Halverson, R. G. Stewart, D. G. Leaverton, R. G. Abbott, C. H. Dietz, G. L. Fitzgerald, D. C. Kok, H. W. Crosby, W. W. Fox, R. M. Overall, P. D. Reed, V. J. Schulman, E. Singer, T. W. Smith, W. N. Thayer, J. L. Weinberg, J. G. Wilson, P. Hampton, R. D. Smith, C. Prutzman, R. W. Arneson, D. Hill, W. P. Gribben, W. O'Bryon, *R. Gant, F. Asaro,* and R. B. Hunt.

Case No: 74-436

Plaintiffs: Colonial Ventures and Colonial Equities.

Defendants: Touche Ross & Co, Union Bank, R. H. Walter, R. S. Walter, J. B. Halverson, R. G. Stewart, D. G. Leaverton, R. G. Abbott, C. H. Dietz, G. L. Fitzgerald, D. C. Kok, H. W. Crosby, W. W. Fox, R. M. Overall, P. D. Reed, V. J. Schulman,

Appendix A — Continued

E. Singer, T. W. Smith, W. N. Thayer, J. L. Weinberg, J. G. Wilson, P. Hampton, R. D. Smith, C. M. Mosser, J. Nakaji, E. D. Hickson, H. H. Litton, W. B. Moeser, R. B. Yerby, T. H. Nielsen, A-H Properties, R. W. Arneson, D. P. Hill, Bay View Investments, W. P. Gribben, C. D. Prutzman, Coastal Land Corp, W. L. O'Bryon, Consolidated Equity Companies, J. L. Schram, D. G. Pratt, J. Taylor, R. Grant, V. Frank Asaro, R. G. King, Predrag Mitrovich, J. Ets-Hokin, and National Community Builders.

Case No: 74-569

Plaintiffs: Societe Generale de Banque, Rentinvest, North American Fund A, and ITF Fund, Ltd.

Defendant: Touche Ross & Co.

Case No: 75-1044

Plaintiffs: Societe Generale de Banque, Rentinvest, North American Fund A, and ITF Fund, Ltd.

Defendant: Union Bank.

Case No: 76-819

Plaintiffs: Societe Generale de Banque, Rentinvest, North American Fund A, and ITF Fund, Ltd.

Defendant: Brown, Wood, Fuller, Caldwell & Ivey and Brown, Wood, Ivey, Mitchell & Petty.

Case No: 74-452

Plaintiff: R. G. Stewart

Defendants: Touche Ross & Co, Union Bank, U. S. Financial, and R. H. Walter.

Case No: 75-1107

Plaintiff: William H. Huff

Defendant: Touche Ross & Co

Appendix A — Continued

Case No: 75-1119

Plaintiff: Robert D. Kelce

Defendants: Touche Ross & Co, and Union Bank.

Case No: 74-92 [Not part of the M.D.L. docket]

Plaintiff: Securities and Exchange Commission

Defendants: USF, R. H. Walter, J. B. Halverson, C. D. Prutzman, R. W. Arneson, D. P. Hill, W. P. Gribben, W. L. O'Bryon, A-H Properties, and Bayview Investments.

Appendix B

Cross-Complainants

The following plaintiffs filed the first of the USF lawsuits. In this appendix, each case is identified by the name of the plaintiff, as follows:

1. Risque
2. Foote
3. Great Commonwealth [complaint has been dismissed]
4. Penn Mart Realty
5. Fabrikant and Binswanger
6. Decatur Income Fund, et al.
7. First National Bank of Toledo
8. Colonial Ventures
9. Mellon Bank

For convenience, some defendants have been arranged into the following groups:

A-H Group:

A-H Properties
R.W. Arneson
Bayview Investments*
Coastal Land Corp.*
D.P. Hill

Goldman Group:

Dean Witter
Drexel, Burnham
Goldman Sachs
Lehman Bros.
Saloman Bros.

*Not a part of the group in some of the cases.

Appendix B — Continued

Kok Group:

D. C. Kok
H. W. Crosby
W. W. Fox
P. Hampton*
R. M. Overall
P. D. Reed
V. J. Schulman
E. Singer
T. W. Smith*
W. N. Thayer
J. L. Weinberg*

*Not a part of the group in some of the cases.

Appendix B — Continued

PLAINTIFFS	*DEFENDANTS*	*CROSS-COMPLAINANTS*
Risque Foote Great Com. Penn Mart Fabrikant Decatur First Natl. Colonial Mellon	R. H. Walter	A-H Group First Calif. Co. Goldman Group Halverson Kok Group O'Bryon Stewart USF Touche Ross Union Bank
Foote Penn Mart Fabrikant Decatur First Natl. Colonial Mellon	Union Bank	A-H Group First Calif. Co. Goldman Group Halverson Kok Group O'Bryon Stewart USF
	Touche Ross	First Calif. Co. Goldman Group Kok Group Leaverton Halverson Stewart USF R. H. Walter
Foote Penn Mart Fabrikant Decatur	USF	Halverson Leaverton Stewart Touche Ross
Foote Great Com. Penn Mart Fabrikant First Natl. Colonial	R. S. Walter	A-H Group First Calif. Co. Goldman Group Halverson Kok Group Stewart USF
Foote Penn Mart Fabrikant Decatur First Natl. Colonial	Hickson	Halverson Stewart USF

Appendix B — Continued

PLAINTIFFS	*DEFENDANTS*	*CROSS-COMPLAINANTS*
Great Com. Penn Mart Fabrikant Decatur First Natl. Colonial Mellon	Halverson	First Calif. Co. Goldman Group A-H Group Kok Group O'Bryon Stewart USF
	Kok Group	Halverson Leaverton Stewart USF
	Stewart	A-H Group First Calif. Co. Goldman Group Kok Group O'Bryon USF
Great Com. Penn Mart Decatur Colonial Mellon	Leaverton	A-H Group Goldman Group First Calif. Co. Kok Group Stewart USF
Penn Mart First Natl. Colonial Mellon	Gribben	First Calif. Co. Kok Group Goldman Group Stewart USF
Penn Mart Colonial	Ets-Hokin Mitrovich National Comm. Bldg. Consolidated Eq. Schram Taylor Pratt	Kok Group Stewart USF
Penn Mart First Natl. Colonial	King	First Calif. Co. Goldman Group Kok Group Stewart USF

Appendix B — Continued

PLAINTIFFS	*DEFENDANTS*	*CROSS-COMPLAINANTS*
Penn Mart Fabrikant Decatur First Natl. Colonial	O'Bryon	First Calif. Co. Goldman Group Halverson Kok Group Stewart USF
	Prutzman	A-H Group First Calif. Co. Goldman Group Halverson Kok Group O'Bryon Stewart USF
Penn Mart Fabrikant Decatur First Natl. Colonial Mellon	A-H Group	Goldman Group Weinberg First Calif. Co. Halverson Kok Group O'Bryon Stewart USF
Penn Mart Colonial Mellon	Gant Asaro	Goldman Group Kok Group Stewart USF
Fabrikant Decatur First Natl. Mellon	Goldman Group Wilson	Halverson
Fabrikant Decatur First Natl.	First Calif. Co.	Halverson A-H Group
	Whitcom Investment	Halverson
Fabrikant Decatur First Natl. Colonial Mellon	Abbot	A-H Group Halverson
First Natl.	Adams	A-H Group